78-1513

No.

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, APPELLANT

v.

PATRICIA ILENE CLARK, GUARDIAN FOR SHAWN D. CLARK AND TRICIA D. CLARK

ON APPEAL FROM THE UNITED STATES COURT OF CLAIMS

JURISDICTIONAL STATEMENT

WADE H. MCCREE, JR.
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PATRICIA ILENE CLARK, GUARDIAN FOR SHAWN D. CLARK AND TRICIA D. CLARK

ON APPEAL FROM THE UNITED STATES COURT OF CLAIMS

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinions of the Court of Claims (App. A and B, *infra*, 1a-7a) are not reported.

JURISDICTION

The final judgment of the Court of Claims (App. B, *infra*, 5a-7a) was entered on November 6, 1978. A notice of appeal was filed on December 5, 1978 (App. C, *infra*, 8a). On January 29, 1979, the

Chief Justice extended the time within which to file a jurisdictional statement or petition for a writ of certiorari to and including April 4, 1979. The jurisdiction of this Court rests on 28 U.S.C. 1252. *Weinberger* v. *Salfi*, 422 U.S. 749, 763 n.8 (1975); *McLucas* v. *DeChamplain*, 421 U.S. 21, 31-32 (1975); *Parker* v. *Levy*, 417 U.S. 733, 742 n.10 (1974).

QUESTIONS PRESENTED

1. Whether 5 U.S.C. 8341(a)(3)(A) of the Civil Service Retirement Act violates the Due Process Clause of the Fifth Amendment by permitting illegitimate children of a deceased federal employee to recover survivors' annuities only if they "lived with the employee * * * in a regular parent-child relationship."

2. Whether sovereign immunity bars the award of retroactive monetary relief to persons denied such annuities under a statute later held unconstitutional.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

2. The Civil Service Retirement Act, 5 U.S.C. 8341(a) provides in pertinent part:

> (3) "child" means—
>
> (A) an unmarried child under 18 years of age, including (i) an adopted child, and (ii) a stepchild or recognized natural child who lived with the employee or Member in a regular parent-child relationship * * *.

3. 28 U.S.C. 1491 provides in pertinent part:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort * * *. To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just * * *.

STATEMENT

The Civil Service Retirement Act, 5 U.S.C. 8331 *et seq.*, authorizes annuities to be paid to eligible civil servants and certain of their relatives. In the event of the death of an eligible employee who

elected a survivors' annuity (see 5 U.S.C. 8339(j)), Section 8341 provides that the employee's surviving spouse and each surviving "child" shall receive annuities in amounts provided for in Section 8341(d). Section 8341 defines a "child" as "an unmarried child under 18 years of age, including [a] recognized natural child who lived with the employee * * * in a regular parent-child relationship." Since 1956, when the "lived-with" requirement was added to the Act, it has been consistently interpreted by the Civil Service Commission (now the Office of Personnel Management)[1] to forbid annuities to any illegitimate child who did not live with the deceased employee in a normal parent-child relationship.[2]

---

[1] As a result of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, and Reorganization Plan No. 2 of 1978, 43 Fed. Reg. 36037, the Civil Service Commission was abolished effective January 1, 1979, and its functions were divided between two new agencies. The Office of Personnel Management assumed responsibility for, among other things, the retirement program for civil servants.

[2] Survivors' annuities were first added to the Act in the 1948 amendments. 62 Stat. 55. Under the 1948 amendments any "child" was eligible, but the Civil Service Commission construed the word "child" to exclude illegitimate children. *Visor* v. *United States*, Civ. No. 9922(2) (E.D. Mo. Feb. 12, 1955), slip op. 2, however, held that "child" included illegitimate children, and the Commission acquiesced in this decision. In 1956 Congress amended the Act to insert the lived-with provision. Although this provision did not expressly exclude any child from receiving benefits, the legislative history suggests that Congress intended to provide no benefits to illegitimate children who did not live with the parent. This construction was accepted in *Proctor* v. *United States*, 448 F. Supp. 418 (D.D.C. 1977). But see *Gentry* v. *United States*, 546 F.2d 343, 356 (Ct.Cl. 1976) (Skelton, J., concurring) (the definition should not be construed to exclude illegitimate children, in view of constitutional issues thereby raised).

Shawn and Tricia Clark are illegitimate children of a deceased federal employee. They were denied survivors' annuities solely because of the lived-with requirement. They filed this suit in the Court of Claims, seeking to recover all payments they would have received but for the lived-with requirement.

On appellees' motion for summary judgment, the court held that the lived-with requirement violates the Due Process Clause of the Fifth Amendment. Relying on its previous decision on the identical issue in *Gentry* v. *United States*, 546 F.2d 343 (1976), the court held that the lived-with requirement impermissibly discriminates between legitimate and illegitimate children solely on the basis of their status at birth (App. A, *infra*, 3a).[3] The court adjudged the liability issue in favor of appellees and remanded to the trial division to determine the amount to be awarded (*id.* at 4a).

The parties then stipulated that the amount of annuity payments due appellees from the date of their father's death on June 2, 1972, through June 29, 1978, was $14,162.66. On November 6, 1978, the court entered a judgment (i) requiring the United States to pay that amount to appellees and (ii) requiring the Civil Service Commission to place respondents on the annuity rolls from June 30, 1978, through the expiration of their eligibility (App. B, *infra*, 6a-7a).

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[3] The government conceded that *Gentry* was dispositive in the Court of Claims but reserved the issue for appeal to this Court. Defendant's Response to Plaintiffs' Motion for Summary Judgment at 2 (filed Oct. 3, 1977).

THE QUESTIONS ARE SUBSTANTIAL

The Court of Claims has held an Act of Congress unconstitutional. In doing so, the court applied an incorrect standard. The court also lacked jurisdiction. Review by this Court of these issues is appropriate.

1. The Constitution does not require identical treatment of legitimate and illegitimate children. The government may treat illegitimate children differently if the differences "bear an evident and substantial relationship to the particular state interests" the statute is designed to serve. *Lalli* v. *Lalli*, No. 77-1115 (Dec. 11, 1978), slip op. 8 (plurality opinion).

The lived-with requirement satisfies this test. The Act is designed to assist the dependents of a deceased civil servant. The legitimacy of a child may be taken as an indication of dependence. See *Mathews* v. *Lucas*, 427 U.S. 495, 511 (1976). Although it would be impermissible to legislate on the assumption that no illegitimate children are dependent on their natural parents (*ibid.*), Congress can require illegitimate children to show dependence in fact as a precondition to eligibility for benefits that arise out of the child's relationship with the parent. The lived-with requirement is a reasonable approach to determining dependence in fact. That an illegitimate child maintained or intended to maintain[4] a regular parent-

[4] The Office of Personnel Management has construed the lived-with clause to require that the child have lived with the employee at the time of his death or, if the child resided elsewhere, that the child have lived with the employee in the past and that the employee and the child have intended, at the time of the death, for the child to resume living with the employee in the near future.

child relationship with the deceased employee at the time of the employee's death is a strong indication of the dependence of that child. This factor bears an "evident and substantial relation" to the goal of the Act.

The Court of Claims held in this case and in *Gentry* v. *United States*, 546 F.2d 343 (1976), that 5 U.S.C. 8341(a)(3)(A) is unconstitutional because the lived-with requirement frustrates the goal of the Act by denying annuities to illegitimate children, such as appellees, who are dependent on but do not live with the federal employee.[5] The court likened this "underinclusiveness" to the "underinclusiveness" found fatal in *Jiminez* v. *Weinberger*, 417 U.S. 628, 637 (1974), which invalidated an absolute depriva-

[5] Several other lower federal courts have declared the lived-with requirement unconstitutional. *Myers* v. *Commissioners of Civil Service Comm'n*, Civ. No. 8682 (S.D. Ohio Aug. 8, 1977); *Proctor* v. *United States*, 448 F. Supp. 418 (D.D.C. 1977); *Tenny* v. *United States*, 441 F. Supp. 224 (E.D. Mo. 1977); *Jenkins* v. *OPM*, Civ. No. 78-0317 (D.D.C. Nov. 9, 1978), appeal pending, No. 79-1199 (D.C. Cir.). The issue has been presented to this Court once before, in *Myers;* the Court remanded for reconsideration in light of *Mathews* v. *Lucas, supra.* See 427 U.S. at 909. The Solicitor General decided not to appeal from the decision on remand in *Myers*, and he did not appeal in *Gentry* because the time to seek review expired before he learned of the entry of the final judgment. Further developments in the law since *Mathews* v. *Lucas*, including this Court's decision in *Lalli*, have made it appropriate to ask this Court to rule on the constitutionality of the statute despite the decision not to docket an appeal in *Proctor* or *Tenny*.

tion of disability benefits for most illegitimate children born after the onset of a parent's disability while allowing afterborn legitimate children to receive benefits.

But any statutory rule broad enough to be administered with speed and convenience necessarily results in either "under" or "overinclusiveness" with respect to the statutory goal. Here, underinclusiveness may be eliminated entirely only by granting factual hearings to all illegitimate children on the issue of dependence. This Court never has held that such individualized determinations are constitutionally required merely because a rule concerning illegitimate children is underinclusive. To the contrary, "presumptions in aid of administrative functions, though they may approximate, rather than precisely mirror, the results that case-by-case adjudications would show, are permissible under the Fifth Amendment, so long as that lack of precise equivalence does not exceed the bounds of substantiality tolerated by the applicable level of scrutiny." *Mathews* v. *Lucas*, *supra*, 427 U.S. at 509.[6] For example, in *Lalli* v. *Lalli*, *supra*, the state imposed a rule that in order to inherit from his intestate father, an illegitimate child must have obtained an "order of filiation" during the lifetime of the father. This rule was challenged as underinclusive because it excluded, among others, recognized children and children found to be

[6] Cf. *Vance* v. *Bradley*, No. 77-1254 (Feb. 22, 1979), slip op. 14-15; *Califano* v. *Aznavorian*, No. 77-991 (Dec. 11, 1978), slip op. 5; *Califano* v. *Jobst*, 434 U.S. 47 (1977); *Mathews* v. *De Castro*, 429 U.S. 181 (1976).

offspring of the father in paternity suits during his lifetime. This Court, observing that "few statutory classifications are entirely free from the criticism that they sometimes produce inequitable results" (plurality slip op. 13), sustained the classification. The need for finality of judgments distributing property, and the concomitant need to be able to identify heirs would have been compromised if recognized illegitimate children and children in successful paternity suits would have to be located and served with process before distribution of the estate.

In the operation of the survivors' annuity program it is likewise important that eligible children be easily and promptly identified. An eligible child may apply for his annuity up to 30 years after he becomes eligible for it. 5 U.S.C. 8345(h)(2). Even when the recipient applies many years after his first eligibility, he is entitled to receive retroactive payments back through the day after the death of the employee. See 5 U.S.C. 8341(e)(2) and 8345. In the meantime, however, the full benefits may have been paid as a lump sum, as here, to a third-party on the assumption that there are no eligible children. Where there are more than three children, moreover, the amount of any one surviving child's annuity depends on the number of children claiming through the deceased employee; inasmuch as the Act places a ceiling on the total amount that may be paid to all children claiming through a single employee, the total is divided equally among all eligible children, 5 U.S.C. 8341(e). As this case illustrates, when children make late claims, earlier overpayments to other claimants,

unless waived, must be recovered by the government (see 5 U.S.C. 8346(b)).[7] Thus, disruption of the operation of the survivors' annuity program occurs where illegitimate children who did not live with the civil servant appear years after his death and demand to participate in the annuity fund. The lived-with requirement facilitates identification from the outset of *all* eligible children. It also sets up an easily administrable and reasonably reliable test for dependence. The proper balance among the competing goals of assisting all those likely to have been dependent on the wage earner, providing benefits large enough to achieve the statutory goal, remaining within the fiscal limitations of the fund, and avoiding undue disruption of the claims and payment process is peculiarly a legislative matter. The balance of these interests struck by 5 U.S.C. 8341 has an "evident and substantial relationship" to these goals.[8]

2. The Court of Claims lacked jurisdiction in this case. The jurisdiction of the Court of Claims rests

[7] In the present case, the government paid the full amount of the employee's contributions in a lump sum to the father of the employee after concluding that there were no eligible children or other annuitants. When appellees sued in the Court of Claims, the United States filed a third-party complaint against the father to recoup the payment in the event appellees were successful (App. A, *infra*, 2a n.3; App. B, *infra*, 7a).

[8] OPM has recommended proposed legislation to the current Congress that it eliminate the lived-with requirement. S. 509, 96th Cong., 1st Sess. (1979); H.R. 2584, 96th Cong., 1st Sess. (1979). That legislation has not been acted on by the responsible committees, however.

on its ability to award money damages as an accrued liability. It can afford prospective relief only if that relief is ancillary to a monetary award. Here, however, monetary relief is barred by sovereign immunity, and thus the court lacked jurisdiction to afford a remedy of any sort. Our argument here is the same as our argument on one of the questions that the Court will consider in *Califano* v. *Boles*, No. 78-808, prob. juris. noted (Jan. 22, 1979).[9]

Monetary relief for past injury is not available against the United States unless Congress has specifically authorized such relief and unequivocally waived its sovereign immunity. *United States* v. *Testan*, 424 U.S. 392, 399 (1976); *United States* v. *King*, 395 U.S. 1, 4 (1969). See also *Quern* v. *Jordan*, No. 77-841 (Mar. 5, 1979); *Nevada* v. *Hall*, No. 77-1337 (Mar. 5, 1979); *Edelman* v. *Jordan*, 415 U.S. 651 (1974). No statute authorizes payments for past periods during which payment was withheld pursuant to a statute that is later declared to be unconstitutional.[10] Consequently, only prospective relief, running from the date of judgment, is available to plaintiffs such as appellees who challenge a statute that denies benefits.

Because the Court of Claims could not award money damages, it lacked jurisdiction to award equitable

[9] See pages 25-32 of our brief in *Boles*. We have furnished a copy of that brief to counsel for appellees.

[10] Here, as in *Boles*, the only arguably pertinent statutes simply authorize a court to order the payment of money when the Executive Branch has failed to pay benefits that the statute itself requires to be paid. Here, however, the statute does not authorize the payment of benefits to appellees.

relief by ordering OPM to place appellees on the annuity rolls. "Throughout its entire history [the Court of Claims'] jurisdiction has been limited to money claims against the United States Government." *United States* v. *King*, 395 U.S. 1, 2-3 (1969); *United States* v. *Testan*, 424 U.S. 392, 397-398 (1976). The court is not authorized to award equitable relief (*id.* at 398).[11] The judgment in this case thus must be vacated, and the complaint dismissed, whether or not the lived-with requirement is constitutional.[12]

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[11] 28 U.S.C. 1491 provides that the Court of Claims may provide limited equitable relief "incident" to a money judgment in order to provide "an entire remedy and to complete the relief afforded by the judgment * * *." The provision, added in 1972 (Pub. L. No. 92-415, Section 1, 86 Stat. 652), applies only when the Court of Claims already has proper jurisdiction to award a money judgment. It is not authority for ordering equitable relief incident to an improper award of money damages. See S. Rep. No. 92-1066, 92d Cong., 2d Sess. 1-3 (1972); H.R. Rep. No. 92-1023, 92d Cong., 2d Sess. 2-3 (1972). Therefore, since the entire money judgment here was impermissible, the court improperly ordered the agency to put appellees on the annuity rolls.

[12] This does not mean that appellees have no remedy. They may seek an injunction in a district court to require OPM to put them on the annuity rolls. Congress has waived sovereign immunity in suits seeking injunctions. 5 U.S.C. 702. Indeed, appellees may already be members of the nationwide plaintiff class in *Jenkins* v. *OPM*, Civ. No. 78-0317 (D.D.C. Nov. 9, 1978), appeal pending, No. 79-1199 (D.C. Cir.), in which the district court held the lived-with requirement unconstitutional and ordered OPM to discontinue using it to deny annuities to class members. Although the government is appealing that decision, appellees may be entitled, as class members, to whatever equitable relief finally is ordered in *Jenkins*.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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APRIL 1979

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 285-76

SHAWN D. CLARK and TRICIA D .CLARK,
Minors, by Patricia I. Clark, their Legal Guardian

v.

THE UNITED STATES

Before DAVIS, *Judge*, Presiding, KUNZIG, and BENNETT, *Judges*.

ORDER

This is a suit, brought on behalf of Shawn D. Clark and Tricia D. Clark (minor children, plaintiffs), for recovery of death benefits and survivor annuities allegedly due them pursuant to the Civil Service Retirement Act of 1930, as amended. 5 U.S.C. §§ 8331-48 (1970). Upon the death of their father, George G. Isaacson, an employee of the Veteran's Administration, the children made timely application to the Civil Service Commission, Bureau of Retirement, Insurance and Occupational Health (BRIOH) for payment of benefits under 5 U.S.C. § 8341(e). BRIOH denied their claim pointing to statutory language which required illegitimate children to have

lived with their father in a "regular parent-child relationship" in order to qualify for survivor annuities.[1] After the * * * determination,[2] the plaintiffs filed suit in this court. The matter is now before us on plaintiffs' motion for summary judgment.[3]

Subsequent to the filing of the instant case, this court has had occasion to deal with the precise statutory provisions now before us. In *Gentry* v. *United States*, 212 Ct.Cl. 1, 546 F.2d 343 (1976),[4] we held

---

[1] 5 U.S.C. § 8341 provides, in pertinent part, as follows:

§ 8341. *Survivor annuities.*

(a) For the purpose of this section—

(3) "child means—

(A) * * * (ii) a stepchild or recognized natural child who lived with the employee or Member in a regular parent-child relationship;

[2] The CSC held that there was no "regular parent-child relationship" at the time of the father's death notwithstanding the following facts: George Isaacson was the father of both children, he had in fact lived with them and their mother under the same roof for some six years, he had thereafter been subject to a court decree to pay child support, and he had continued to provide child support until the time of his death.

[3] This court is aware of defendant's assertion that, after finding the children not eligible, CSC made an award of $7,755.12 to the father of George G. Isaacson. In 1976, defendant filed a contingent third party cross-motion against the father, but defendant has not followed up on its third party cross-motion, and it is not before the court on this motion for summary judgment.

[4] The case is also reported at 212 Ct.Cl. 27, 551 F.2d 852 (1977) (Order denying Defendant's Motion for Rehearing). Defendant, perhaps because of the compelling factual circumstances present in the case now before us (*see* note 2, *supra*), has apparently abandoned its contention (which it made on motion for rehearing in *Gentry*) that some determination as to "degree of dependency" might be necessary.

a portion of 5 U.S.C. § 8341 to be unconstitutional insofar as it discriminates between legitimate and illegitimate children solely on the basis of their status at birth. Since the Government now quite properly concedes that *Gentry*, *supra*, is dispositive of the case now before us, the only issue to decide is whether we should remand to the CSC as we did in *Gentry*.

Despite the Government's request that we remand to the CSC for further factual determination, it is not appropriate to do so in this case. In *Gentry*, it was necessary to determine "whether plaintiff is in fact the child of the deceased annuitant, and whether the latter recognized and supported him as such." *Gentry*, *supra* at 355. Here, on the other hand, there is no dispute over the facts of parentage, recognition, and support. Indeed, a prior, valid, judgment is conclusive on these points. *Clark* v. *Isaacson*, No. 5625 (Dist. Ct., 1st Dist. of Mont., Broadwater County, June 2, 1972). As there are thus no factual determinations to be made bearing on the right to recover, a remand to the CSC would serve no purpose.

In summary, on the uncontested facts of parentage, recognition, and support, plaintiffs have shown that they have a right to recover the benefits provided by 5 U.S.C. § 8341(e). Because this court has previously held a portion of 5 U.S.C. § 8341 to be unconstitutional insofar as it discriminates between legitimate and illegitimate children solely on the basis

of their status at birth, and since there are no factual issues which require CSC determination, we hold that plaintiffs are entitled to recover the annuity provided by the statute.

Accordingly, IT IS HEREBY ORDERED, upon consideration of the pleadings and exhibits, without oral argument, that plaintiffs' motion for summary judgment is granted. Judgment is therefore entered for plaintiffs, and the cause is remanded to the Trial Division for further proceedings under Rule 131(c) to determine the amount to be awarded plaintiffs, consistent with this opinion.

January 27, 1978

BY THE COURT

/s/ Oscar H. Davis
OSCAR H. DAVIS
Judge, Presiding

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

No. 285-76

PATRICIA ILENE CLARK, Legal Guardian of Shawn Douglas Clark and Tricia Deanne Clark, minors, and Shawn Douglas Clark and Tricia Deanne Clark individually, PLAINTIFFS

v.

THE UNITED STATES, DEFENDANT

and

GEORGE G. ISAACSON, THIRD-PARTY DEFENDANT

Before FRIEDMAN, *Chief Judge*, BENNETT and SMITH, *Judges*.

ORDER

This suit was brought on behalf of two minor children for recovery of death benefits and survivor annuities due them pursuant to 5 U.S.C. §§ 8331-8348 (1970). We granted plaintiffs' motion for summary judgment as to the liability question and remanded the case to the trial division for further proceedings under Rule 131(c) to determine the amount to be

awarded plaintiffs. *Clark* v. *United States*. Ct. Cl. No. 285-76 (order, Jan. 27, 1978). The parties, on August 11, 1978, submitted a stipulation for the entry of judgment which we have reviewed and accept in its entirety.

On September 7, 1976, defendant moved the court, pursuant to Rule 41(a)(2), to summon George G. Isaacson as a contingent debtor in this case. By order dated September 23, 1976, the court allowed defendant's motion, issued said summons and filed defendant's contingent cross-claim against the third party. The third party was personally served the summons by a U.S. Marshal and has failed to respond to defendant's claim.

The basis of defendant's contingent cross-claim was that defendant had made payment of $7,755.12 to the third party upon the finding that the above-named plaintiffs were not entitled to benefits. Upon our finding that the plaintiffs herein were entitled to the benefits, it is concluded that the third party was not entitled to the payment. Therefore, we grant judgment *pro confesso* under Rule 41(f) in favor of defendant against the third party.

IT IS THEREFORE ORDERED that defendant pay Patricia Ilene Clark, in her capacity as legal guardian, on behalf of Shawn Douglas Clark, the amount of $7,081.33 and, on behalf of Tricia Deanne Clark, the amount of $7,081.33, such amounts being those due and owing up to June 30, 1978.

IT IS FURTHER ORDERED that Shawn Douglas Clark and Tricia Deanne Clark be placed on the ap-

propriate Civil Service Commission annuity rolls for continued payments of the children's survivor annuity, pursuant to 5 U.S.C. § 8341(e), from June 30, 1978, to the expiration of their eligibility.

IT IS FURTHER ORDERED that judgment be entered in favor of the United States against George G. Isaacson in the amount of $7,755.12.

November 6, 1978

BY THE COURT

/s/ Daniel M. Friedman
DANIEL M. FRIEDMAN
Chief Judge

APPENDIX C

IN THE UNITED STATES COURT OF CLAIMS

No. 285-76

PATRICIA ILENE CLARK, et al., PLAINTIFFS

v.

THE UNITED STATES, DEFENDANT

NOTICE OF APPEAL

Notice is hereby given that the defendant hereby appeals to the Supreme Court of the United States, pursuant to 28 U.S.C. §§ 1252 and 2101(a), from the order of the Court of Claims entered in this action on January 27, 1978, and from the final order of the Court of Claims entered in this action on November 6, 1978.

December 5, 1978

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APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1513

UNITED STATES OF AMERICA,

Appellant

—*v.*—

PATRICIA ILENE CLARK, GUARDIAN FOR SHAWN D. CLARK AND TRICIA D. CLARK

ON APPEAL FROM THE UNITED STATES COURT OF CLAIMS

JURISDICTIONAL STATEMENT FILED APRIL 4, 1979
CONSIDERATION OF JURISDICTION POSTPONED MAY 21, 1979

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1513

UNITED STATES OF AMERICA,

Appellant

—*v.*—

PATRICIA ILENE CLARK, GUARDIAN FOR
SHAWN D. CLARK AND TRICIA D. CLARK

ON APPEAL FROM THE UNITED STATES COURT OF CLAIMS

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DOCKET ENTRIES

DATE	PROCEEDINGS
Jul 9 1976	Filing fee of $10 paid by plaintiffs.
Jul 15 1976	Notice of reference to Trial Judge Harry E. Wood filed. Copy to parties.
Sep 7 1976	Defendant's answer to the petition filed. Copies (5) to atty.
Sep 7 1976	Defendant's motion for summons to third party (George Isaacson) filed Copies (2) to atty. ALLOWED SEP 23 1976, and summons issued and delivered this day to defendant's attorney for service.
Sep 23 1976	Defendant's contingent cross claim against third party filed. Copies (5) to atty.
Oct 22 1976	Return of U. S. Marshal showing service of summons on George Isaacson on October 8, 1976. Notice to parties.
Feb 10 1977	Plaintiffs' motion for summary judgment filed. Copies (5) to deft.
Mar 11 1977	Defendant's motion to suspend further proceedings (pendings outcome of No. 312-74) filed. Copies (2) to atty. ALLOWED MAR 25 1977.
Jul 7 1977	Plaintiffs' motion for entry of judgment on their motion for summary judgment filed. Copies (2) deft. SEP 2 1977 Defendant is granted 30 days from this date from which to respond to plaintiffs' motion for summary judgment and upon the completion of briefing the case will be referred to an appropriate motion panel.
Jul 15 1977	Defendant's motion for extension of time (to August 17, 1977) to respond to motion for entry of judgment filed. Copies (2) to atty. ALLOWED JULY 27 1977.
Jul 28 1977	Plaintiff's opposition to defendant's motion for extension of time filed. Copies (2) to deft.

DATE	PROCEEDINGS

Aug 17 1977 Defendant's response to motion for entry of judgment filed. Copies (5) to atty.

Aug 26 1977 Plaintiffs' reply to defendant's response to plaintiffs' motion for entry of judgment filed. Copies (5) to deft.

Oct 3 1977 Defendant's response to plaintiffs' motion for summary judgment filed. Copies (5) to atty.

Oct 20 1977 Plaintiffs' reply in support of their motion for summary judgment filed. Copies (5) to deft.

Oct 20 1977 Submitted to the court on plaintiff's motion for summary judgment.

Jan 27 1978 Court entered order granting plaintiffs' motion for summary judgment and judgment is entered for plaintiffs with the case remanded to the Trial Division for further proceedings pursuant to Rule 131(c) in accordance with the order. Copy to parties.

Feb 9 1978 Defendant's motion for extension of time (to February 25, 1978) to file motion for rehearing filed. Copies (2) to atty. ALLOWED FEB 17 1978.

Feb 27 1978 Defendant's motion for extension of time (to March 29, 1978) to file motion for rehearing filed. Copies (2) to atty. ALLOWED MAR 17 1978.

Aug 11 1978 Stipulation for the entry of judgment filed by plaintiff. Copies (2) to deft.

Aug 14 1978 Defendant's contingent motion for judgment against third party filed. Copies (2) to atty and George Isaacson.

Nov 6 1978 Court filed order that defendant pay Patricia Ilene Clark, in her capacity as legal guardian, on behalf of Shawn Douglas Clark, the amount of $7,081.33 and, on behalf of Tricia Deanne Clark, the amount of $7,081.33 such amounts being those due and owing up to June 30, 1978; that Shawn Douglas Clark and Tricia Deanne Clark

DATE	PROCEEDINGS

be placed on the appropriate Civil Service Commission annuity rolls for continued payments of the children's survivor annuity pursuant to 5 U.S.C. § 8341(e), from June 30, 1978 to the expiration of their eligibility; and, that judgment be entered in favor of the U.S. against George G. Isaacson in the amount of $7,755.12. Copy to deft, pltf and George Isaacson.

Nov 6 1978 Certified copy of court's order forwarded to Civil Service Commission.

Nov 7 1978 Attested transcript of judgment delivered to attorney of record for plaintiff Edward L. Merrigan By Renee LeBel.

Dec 5 1978 Notice of appeal to the Supreme Court filed by deft. Copy to atty and to Isaacson.

Dec 6 1978 Defendant's motion for correction of clerical error filed. Copies (2) to atty and one to Isaacson. SEE ORDER OF DEC 8, 1978.

Dec 8 1978 Court entered order granting defendant's motion, filed December 6, 1978, for correction of clerical error and correcting the order of November 6, 1978, to read George Isaacson wherever the name George G. Isaacson appears therein. Copy to parties.

Apr 6 1979 Notice of filing in the Supreme Court of an Appeal on April 4, 1979, No. 78-1513 October Term, 1978 filed.

May 24 1979 Order of the Supreme Court, dated May 21, 1979, postponing further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits filed. See letter in file.

UNITED STATES CIVIL SERVICE COMMISSION
BOARD OF APPEALS AND REVIEW
Washington, D.C. 20415

DECISION

IN THE MATTER OF

GEORGE G. ISSACSON

CSF 1 007 211

TYPE CASE: *DEATH BENEFITS*

BEFORE: Zwirn, Staiman and Jeffries,
Board Members.

INTRODUCTION

Patricia Clark, through her attorney, is appealing the decision of the Commission's Bureau of Retirement, Insurance, and Occupational Health that the children for whom she is legal guardian, Shawn Douglas and Tricia Deanne Clark, did not live with George G. Isaacson in a parent-child relationship and therefore are ineligible to receive a survivor annuity as the natural children of Mr. Issacson.

STATEMENT OF THE CASE

Mr. Issacson was employed by the Veteran's Administration Center, Fort Harrison, Montana, at the time of his death on August 17, 1974. Applications for death benefits have been filed by Mr. George Isaacson, who is the son [sic] and also the designated beneficiary of the decedent; and by Ms. Patricia Clark, on behalf of his natural children, Shawn Douglas and Tricia Deanne Clark. By decision dated September 27, 1974, BRIOH dismissed Ms. Clark's claim on the ground that S.D. and T.D. Clark did not qualify for a survivor annuity since they did not live with the decedent in a regular parent-child relationship. The Bureau determined that the death benefit due is a lump sum payment, and has made payment to Mr. Isaacson, the designated beneficiary.

REPRESENTATIONS TO THE BOARD

In the appeal from the decision of the Bureau of Retirement, Insurance, and Occupational Health, it is contended that S.D. Clark and T.D. Clark were legitimated, not illegitimate children, and therefore "entitled to the survivor's annuity they claim under the provisions of 5 USC 8341 which direct that such annuity is payable to 'an unmarried child under 18 years of age', without the need for further showing (applicable to illegitimate children only) that said children were 'recognized' and that as illegitimate children, they physically lived with the employee in a regular parent-child relationship."

Alternatively, it is submitted that in the event the Board finds it appropriate to consider the children as illegitimate, they would still be entitled to a survivor annuity "because the available evidence shows and will show that said children, born to decedent three years apart by the same mother, were decedent's 'recognized natural children' who did 'live with the employee . . . in a regular parent-child relationship' within the sense, spirit and meaning of 5 U.S.C. 8341(a)(3)(A)."

The appellants specifically requested:

(i) that they be afforded the right to file further evidence in support of this appeal in the form of affidavits or other written proof;

(ii) that they be afforded a hearing before the Board before a decision is rendered;

(iii) that they be afforded the right to file a brief or memorandum with reference to the applicable law;

(iv) that they be afforded the right to establish herein that, if appellant children are denied relief in this case, the Civil Service Retirement Law, thus applied, is unconstitutional.

By letter dated February 18, 1974, the appellants were requested to supply the Board with affidavits from at least two disinterested parties stating that the decedent lived with S.D. and T.D. Clark in a regular parent-child

relationship, and were invited to file a brief or memorandum of law with reference to the law applicable to this case. The appellants were also advised that the appeals procedure with regard to eligibility for Civil Service retirement benefits does not provide for a hearing.

In response to the Board's letter, the appellants submitted three affidavits, in which there was discussed the decedent's and Ms. Clark's relationship, the conduct of the decedent toward the Clark children, and the basis for the affiants' knowledge of these matters. In addition, the contention was reiterated that the children had been legitimated by a formal decree entered June 2, 1972, by the District Court for the First Judicial District of Montana, Broadwater County, in a paternity case entitled *Clark* v. *Isaacson* (No. 5626), wherein the Court found that George Gerald Isaacson was the father of Shawn Douglas Clark and Tricia Deanne Clark, and that Patricia Clark was their mother, and ordered Mr. Isaacson to support the two children and make them the beneficiaries of his Federal Employees Group Life Insurance.

Finally, there has been submitted an affidavit of the designated beneficiary of the deceased, offering to return the lump sum payment he received if a determination is made by the Commission to provide the claimant children with the requested monthly survivor benefits.

ANALYSIS AND FINDINGS

The Appeals Review Board has reviewed the entire record in the case and has fully considered appellants' representations; however, the Board finds no basis to reverse the Bureau's decision.

Under the definition of "child" contained in 5 U.S.C. 8341(a)(3) and amplified in FPM Supplement 831-1, subchapter 17(2)(J), acvknowledged illegitimate children may be entitled to a survivor annuity if, among other requirements, they *lived with* the employee in a regular parent-child relationship. In the administration of the Civil Service Retirement System, "living with" has been construed as meaning that the child and parent

shared a common roof under conditions with indicated more than a mere coincidence of residence. While periodic or temporary separation does not bar "living with", the circumstances must indicate that the child and parent have shared and again expect to share a common roof or resume a common residence when conditions permit.

The Commission has consistently held that the "living with" requirement is not met when the parent maintains a residence different from the child or if the parent and child are not living together at the time of the employee's death. The use of the language "had lived" in the instructional material in the FPM is not viewed as meaning that the existence of a past parent-child relationship qualifies the child for a survivor annuity. The provision of the retirement law which defines the term "child" for survivor annuity purposes also speaks in the past tense, but this is understandable since the death of the employee terminates the relationship. However, it is the Commission's position that the circumstances in a particular case must be such as to establish that the "lived in a parent-child relationship" existed to the time of death of the employee. There is no such showing in this case.

The certificate of death for George Gerald Isaacson indicates that his date of death was August 17, 1974. The affidavits giving detailed information concerning his alleged parent-child relationship with the Clark children all stated that the alleged relationship existed from either 1965 or 1966 until 1971. Indeed, the formal decree of the Montana court, in which decedent was ordered to support the Clark children, is dated June 2, 1972. Under the circumstances, the Board must conclude that the decedent did not live in a parent-child relationship with the Clark children from at least 1972 until the date of his death in 1974. The Board therefore concurs with the BRIOH decision that a regular parent-child relationship did not exist between the deceased, and Shawn and Tricia Clark.

Appellant's argument that "the children were formally legitimated by decree of the Montana Court" is without merit.

Under the Civil Service Retirement law, the determination of familial relationships is left to the laws of the individual states. *See Yarbrough* v. *United States*, 341 F.2d (Ct. Cl. 1965) [sic]. Thus, whether a child is legitimate or natural (illegitimate) child [sic] must be determined by looking to the law of the state of the child's domicile. In this case, the law of the State of Montana must be applied.

In Montana the father of a child born out of wedlock is liable "for the reasonable expense of the mother's pregnancy, and confinement and for the education, necessary support and funeral expenses of [his] child." Rev. Codes of Montana, section 93-2901-1 (Repl. Vol. 7, 1947 ed.) The fact of paternity and the obligation of support which flows from such a determination may be adjudged and enforced by a State of Montana district court. Rev. Codes of Montana, sections 93-2901-2,-5 (Repl. Vol 7, 1947 ed.). However, chapter 2901, Support of Children Born Out of Wedlock (located at page 1057 *et seq*, Repl. Vol. 7, 1947 ed., Rev. Codes of Montana), does not provide for the legitimization of children born out of wedlock through a finding of paternity. Appellant's contention in paragraph 5 of the appeal brief that a finding of paternity legitimates the children born of an out-of wedlock relationship has no basis in Montana law.

Section 93-2901-1, supra, provides, in part, that "nothing herein contained shall affect the presumptions of legitimacy otherwise provided by statute." The only presumptions of the legitimacy of children in Montana are (1) that all children born in wedlock are legitimate and (2) that all children born within 10 months of the dissolution of a marriage are legitimate. Rev. Codes of Montana, sections 61-101, 102 (2nd Repl. Vol. 4, Part 1, 1947 ed.). Further, Montana law provides (1) that a child born out of wedlock acquires the status of a legitimate child if the parents intermarry and (2) that a child born of a void marriage or a marirage dissolved by divorce is legitimate. Rev. Codes of Montana, sections 61-123 (2nd Repl. Vol. 6, Part II, 1947 ed.) No marriage has been claimed in this case; therefore, none of

the sections of law noted above apply here. The Board has been unable to locate, and appellant fails to cite in the appeal brief, any other sections of law which confer legitimacy on children born out of wedlock.

The fact that an individual adjudged by a Montana Court to be the father of illegitimate children is required by court order to support the children and name them as beneficiaries of life insurance policies is not dispositive of the issue of whether the children are legitimate or illegitimate.

The order of support provided by appellant makes no reference to the legitimacy or illegitimacy of the children to be supported. No Montana statute we have found confers legitimacy on children in the position of appellant's children. Therefore, the Board must consider the appellant's children to be illegitimate.

The offer of the designated beneficiaries of the deceased Federal employee to return the lump-sum payment they received should the Commission determine that appellant's children are entitled to survivor annuities has no effect on this case. A lump-sum payment may be made to a designated beneficiary only when no annuity or survivor is payable. 5 U.S.C. 8342(e). Therefore, if it were determined that survivor annuities were payable in this case, payment of the lump-sum benefit would have been in error and the Commission would be required to collect the amount of the lump-sum payment made from the designated beneficiaries.

The Board notes appellants' argument that 5 U.S.C. 8341 is unconstitutional. However, until this provision of the retirement law is held unconstitutional by a court of competent jurisdiction, the Commission has no alternative but to continue its enforcement.

DECISION

In view of the foregoing analysis and findings, the Appeals Review Board hereby affirms the decision of the Bureau of Retirement, Insurance, and Occupational

Health. Civil Service regulations provide that the decision of the Board is final and there is no further right of administrative appeal.

For the Board:

/s/ Herman D. Staiman
HERMAN D. STAIMAN
Chairman

Jan. 7, 1976

IN THE
UNITED STATES COURT OF CLAIMS

No. 285-76

[Filed Jul. 9, 1976]

PATRICIA ILENE CLARK, Legal Guardian of SHAWN DOUGLAS CLARK and TRICIA DEANNE CLARK, minors, and SHAWN DOUGLAS CLARK and TRICIA DEANNE CLARK individually, PLAINTIFFS

v.

THE UNITED STATES, DEFENDANT

PETITION

Plaintiffs, Patricia Ilene Clark, Legal Guardian of Shawn Douglas Clark and Tricia Deanne Clark, minors, and Shawn Douglas Clark and Tricia Deanne Clark, individually and for and on their own behalf, complaining of defendant herein, respectfully allege as follows:

1. Plaintiff Patricia Ilene Clark is a citizen of the United States, a resident of the State of Montana, and she is the mother and legal guardian of plaintiffs Shawn Douglas Clark, a minor child eight (8) years of age, and Tricia Deanne Clark, a minor child five (5) years of age, both of whom are citizens of the United States and residents of the State of Montana. Plaintiff Patricia Ilene Clark thus brings this action in her capacity as legal guardian for and on behalf of her said children, plaintiffs Shawn Douglas Clark and Tricia Deanne Clark. In the alternative, and to the extent they have any legal

standing to assert their own claims before this Court, plaintiffs Shawn Douglas Clark and Tricia Deanne Clark bring this action individually and for and in their own behalf against the defendant herein.

2. This Court's jurisdiction over this action is based on the provisions of Title 28 U.S.C. § 1491, this being a claim against the United States founded upon an Act of Congress, regulations of an executive department thereunder, and upon the Constitution of the United States.

3. Heretofore, and for a period of several years prior to his death on August 17, 1974, George G. Isaacson, the father of plaintiffs Shawn Douglas Clark and Tricia Deanne Clark, was a federal civil service employee of deefndant herein, employed by defendant's Veteran's Administration Center located at Fort Harrison, Montana.

4. When plaintiffs Shawn Douglas Clark and Tricia Deanne Clark were born respectively in 1968 and 1971, their father, the said George G. Isaacson, and their mother, plaintiff Patricia Ilene Clark, were not formally married. Nevertheless, their said parents regularly and openly cohabited as man and wife in the same dwelling place; they lived together with plaintiff children as mother and father from and after the children's respective births, and they regularly and openly acknowledged both children as their own without any contradition whatsoever.

5. Indeed, on June 2, 1972, approximately two years before the death of the said George G. Isaacson, a judgment was rendered by the District Court for the First Judicial District of Montana, County of Broadwater, in an action entitled *Patricia Ilene Clark* v. *George Gerald Isaacson*, copy of which is annexed hereto, made a part hereof and marked *Exhibit A*, wherein the Montana court specifically found and decreed:

> (i) "That the plaintiff Patricia Ilene Clark is the mother of Shawn Douglas Clark, who was born at St. John's Hospital, Helena, Montana, on April 13, 1968, and of Tricia Deanne Clark, who was born at St. Peter's Hospital, Helena, Montana, on January 28, 1971"; and

> (ii) "That the defendant, George Gerald Isaacson, is the father of Shawn Douglas Clark and Tricia Deanne Clark, above described."

6. Having made those findings and stated those conclusions, and having found further that the said George Gerald Isaacson was regularly employed by defendant's Veteran's Administration at Fort Harrison, Montana where he earned in excess of $12,000 per year, the Court ordered and decreed that George Gerald Isaacson provide monetary support for plaintiffs Shawn Douglas Clark and Tricia Deanne Clark, his children, as follows:

(a) He was ordered to pay, no later than June 1, 1972, the sum of $5,000 in settlement of all past support obligations to his said children;

(b) He was ordered to pay, commencing June 1, 1972, $60 per month to each of said children, or $120 per month for both, in future, continuing support payments, such monthly payments to continue until such time as each of the said children reached the age of majority;

(c) He was ordered, in addition, to make the said children prime beneficiaries on a New York Life Insurance Company policy and on a Federal Employees Group Life Insurance policy he held in force, and he was directed to submit such change of beneficiaries under said policies to the court for its approval.

7. Thereafter, and up to and including approximately the time of his sudden, accidental death in August, 1974 as aforesaid, the said George Gerald Isaacson fully and continuously complied with the aforementioned decree of the Montana court, and he regularly provided all support payments and other benefits to plaintiffs Shawn Douglas Clark and Tricia Deanne Clark as directed by the court's said judgment.

8. Accordingly, upon the death of the said George Gerald Isaacson in 1974 as aforesaid, his two children, plaintiffs Shawn Douglas Clark and Tricia Deanne Clark, made due and timely application to defendant's United States Civil Service Commission, Bureau of Retirement, Insurance and Occupational Health, for payment of any and all death benefits and/or survivor annuities payable

to children of deceased federal civil service employees such as the said Isaacson under and pursuant to the federal Civil Service Retirement statutes (5 U.S.C. 8301 et seq.).

9. On or about September 27, 1974, however, defendant's said United States Civil Service Commission, Bureau of Retirement, Insurance and Occupational Health, responded to said application stating "*No Benefits Are Payable*" for the asserted reason:

> "Under the Civil Service law, an illegitimate child does not qualify for survivor monthly benefits unless living in a parent-child relationship."

10. Plaintiffs thereupon appealed within the time prescribed by the applicable Civil Service Retirement Regulations and directions received from defendant's Civil Service Commission to the Commission's Appeals Review Board. After an inexplicable delay of almost a full year, said Board finally rendered a decision, copy of which is annexed hereto, made a part hereof and marked *Exhibit B*, wherein it affirmed the adverse ruling of the Bureau of Retirement, Insurance and Occupational Health and ruled that no death or survivor benefits are payable to plaintiffs under the Civil Service Retirement statutes. In explanation of its ruling, the Board stated:

> "Under the definition of "child" contained in 5 U.S.C. 8341(a)(3) and amplified in FPM Supplement 831-1, subchapter 17(2)(J), acknowledged illegitimate children may be entitled to a survivor annuity if, among other requirements, they *lived with* the employee in a regular parent-child relationship. In the administration of the Civil Service Retirement System, "living with" has been construed as meaning that the child and parent shared a common roof under conditions which indicated more than a mere coincidence of residence. While periodic or temporary separation does not bar "living with", the circumstances must indicate that the child and parent have shared and again expect to share a common roof or resume a common residence when conditions permit.

> "The Commission has consistently held that the "living with" requirement is not met when the parent maintains a residence different from the child or if the parent and child are not living together at the time of the employee's death. The use of the language "had lived" in the instructional material in the FPM is not viewed as meaning that the existence of a past parent-child relationship qualifies the child for a survivor annuity. The provision of the retirement law which defines the term "child" for survivor annuity purposes also speaks in the past tense, but this is understandable since the death of an employee terminates the relationship. However, it is the Commission's position that the circumstances in a particular case must be such as to establish that the "lived in a parent-child relationship" existed to the time of death of the employee. There is no such showing in this case.
>
> "The certificate of death for George Gerald Isaacson indicates that his date of death was August 17, 1974. The affidavits giving detailed information concerning his alleged parent-child relationship with the Clark children all stated that the alleged relationship existed from either 1965 or 1966 until 1971. Indeed, the formal decree of the Montana court, in which decedent was ordered to support the Clark children, is dated June 2, 1972. Under the circumstances, the Board must conclude that the decedent did not live in a parent-child relationship with the Clark children from at least 1972 until the date of his death in 1974. . . ."

11. In the course of its adverse ruling, *Exhibit B* herein, defendant's Civil Service Commission's Appeals Review Board stated that, in addition to plaintiffs herein, the father of the deceased George Gerald Isaacson, one George Isaacson, had also filed a claim for death benefits under the Civil Service Retirement laws as "the designated beneficiary of the decedent". The Board went on to state that since plaintiff minor children were ruled ineligible to collect the statutory death benefits, the Bu-

reau of Retirement, Insurance and Occupational Health had proceeded, on or about September 27, 1974 to make a "lump-sum settlement" with the decedent's father, Mr. Isaacson, and that the amount payable to Mr. Isaacson under the terms of said settlement had been paid.

However, before the Board rendered its adverse ruling, *Exhibit B* hereto, the decedent's father, Mr. Isaacson, caused an affidavit, copy of which is annexed hereto, made a part hereof and marked *Exhibit C*, to be filed with the Board which stated:

> "The undersigned George Isaacson, the designated beneficiary of George Gerald Isaacson as provided by Section 8342(c) of Title 5 U.S.C. has no objection to the award of monthly survivor benefits to Shawn Douglas Clark and Tricia Deanne Clark, and if such determination is made, the sum of Seven Thousand Seven Hundred and Fifty Five and 12/100 Dollars ($7,755.12) heretofore paid to the undersigned as designated beneficiary shall be returned to the United States Civil Service Commission, Bureau of Retirement, Insurance and Occupational Health."

But, in its aforementioned ruling, the Board nevertheless stated:

> "The offer of the designated beneficiaries (sic) of the deceased Federal employee to return the lump-sum payment they (sic) received should the Commission determine that appellant's children are entitled to survivor annuities has no effect on this case. A lump-sum payment may be made to a designated beneficiary only when no annuity or survivor is payable. 5 U.S.C. 8342(e). Therefore, if it were determined that survivor annuities were payable in this case, payment of the lump-sum benefit would have been in error and the Commission would be required to collect the amount of the lump-sum payment made from the designated beneficiaries (sic)."

12. Plaintiffs assert they are lawfully entitled to the death benefits or survivor annuities they seek herein under the provisions of the federal Civil Service Retirement statutes (5 U.S.C. 8301 et seq.); that the two minor plaintiffs herein, and each of them, did in truth and in fact live in a regular parent-child relationship with their deceased father, George Gerald Isaacson; that clearly, under and pursuant to the decree of the Montana court, *Exhibit A* hereto, the deceased George Gerald Isaacson was judicially adjudged and decreed to be their father and they, his children; that pursuant to the same decree, the deceased George Gerald Isaacson did, in truth and in fact, support them as his children up to approximately the time of his death, and otherwise in all respects openly and regularly recognized said minor plaintiffs to be his children within the letter, sense and spirit of Title 5 U.S.C. 8341 et seq. entitled "Survivor Annuities".

13. Plaintiffs assert further that the adverse rulings rendered by defendant's Civil Service Commission's Bureau of Retirement, Insurance and Occupational Health were in all respects erroneous, arbitrary, capricious and contrary to the preponderance of the evidence presented by the parties, and that same should be vacated and overruled by this Court.

14. Plaintiffs assert further that the aforementioned decree issued by the Montana court, *Exhibit A* hereto, had the absolute effect of legitimating both minor plaintiffs herein as the natural children of the deceased George Gerald Isaacson, and that under Montana law (*Revised Code of Montana, Section 91-404*) children thus legitimated by Court decree enjoy the same survivorship and inheritance rights and status, as a matter of law, as children born out of regular wedlock. Plaintiffs thus allege it was erroneous and improper for defendant's Appeals Review Board to rule:.

> "Appellant's contention . . . that a finding of paternity legitimates the children born of an out-of-wedlock relationship has no basis in Montana law. . . .
>
> "Therefore, the Board must consider the appellant's children to be illegitimate."

15. Plaintiffs assert, in addition, that the federal Civil Service Retirement laws (5 U.S.C. 8301 et seq.), and more specifically those portions thereof entitled "Survivor Annuities" (5 U.S.C. 8341 et seq.), as administered, applied and construed by defendant's Civil Service Commission, Bureau of Retirement, Insurance and Occupational Health, and by the Commission's Appeals Review Board, are violative of the Fifth Amendment to the Constitution of the United States in that they have operated to deprive the minor plaintiffs herein of their property without due process of law, and without any opportunity for a hearing at which they could confront and cross-examine their adversaries.

16. Plaintiffs assert further that the federal Civil Service Retirement laws (5 U.S.C. 8301 et seq.), and more specifically those portions thereof entitled "Survivor Annuities" (5 U.S.C. 8341 et seq.), as administered, applied and construed by defendant's Civil Service Commission, Bureau of Retirement, Insurance and Occupational Health, and by the Commission's Appeals Review Board, are violative of the Fifth Amendment to the Constitution of the United States in that they deny the minor plaintiffs to this action equal protection of the laws solely because said plaintiffs are allegedly "illegitimate children" who were not living with their Court-decreed father under "a common roof" at the time of his death in an automobile accident. Said statute, so administered, applied, and construed, grossly and insidiously discriminates against the minor plaintiffs herein while "legitimate children" and "adopted children" who have never lived under a common roof with their deceased fathers, or who have not lived with him for several years are awarded survivor annuities upon his death without pause or question.

Said statute, so administered, applied and construed, likewise grossly and insidiously discriminates against the minor plaintiffs herein while other "step children" or "illegitimate children" never possessed of a court decree such as the Montana judgment in this action, *Exhibit A* hereto, are readily accorded full and complete "survivor annuities" under said statute solely because they

are able to convince defendant's Commission, Bureau, or Board that they were living under "a common roof" with their "stepfather" or "illegitimate father" at or about the precise time of his death.

17. Plaintiffs assert finally, therefore, that the two minor plaintiffs herein are lawfully entitled to the survivor annuities and other death benefits they claim herein, and that judgment in their favor should be granted as a matter of law and right.

Wherefore, plaintiffs pray that judgment be entered herein, in the alternative, in favor of plaintiff Patricia Ilene Clark in her capacity as Legal Guardian and mother of the two minor plaintiffs herein, or in favor of the two minor plaintiffs Shawn Douglas Clark and Tricia Deanne Clark, and each of them, against the United States ordering and directing defendant to pay all death benefits and survivor annuities owed to the minor plaintiffs herein as the lawful survivors of George Gerald Isaacson, deceased, under the Civil Service Retirement laws (5 U.S.C. 8301 et seq.), and that all amounts presently owed from and since the time of his death on August 17, 1974 be computed and paid without further delay, and that such other and further relief be granted as may be just, lawful and proper.

/s/ Edward L. Merrigan
EDWARD L. MERRIGAN
SMATHERS, MERRIGAN & HERLONG
Attorneys for Plaintiffs
888 17th Street, N.W.
Washington, D.C. 20006

IN THE UNITED STATES COURT OF CLAIMS

No. 285-76

PATRICIA ILENE CLARK, ETC., PLAINTIFF

v.

UNITED STATES, DEFENDANT

DEFENDANT'S ANSWER

SEP 7 1976

For its answer to the petition herein, defendant admits, denies, and alleges as follows:

1. Denies the allegations contained in paragraph 1 for lack of knowledge or information sufficient to form a belief as to the truth thereof.

2. The allegations contained in paragraph 2 constitute conclusions of law requiring no response; however, to the extent that they may be deemed to constitute allegations of material fact they are denied.

3. Denies, except admits that prior to his death on August 17, 1974, George G. Isaacson had been a federal civil service employee, employed by the Veteran's Administration at Fort Harrison, Montana.

4. Denies the allegations contained in the first sentence of paragraph 4, except admits that George G. Isaacson and Patricia Ilene Clark were never married. Denies the remainder of paragraph 4 for lack of knowledge or information sufficient to form a belief as to the truth thereof. Answering further, defendant avers that during the period in question, George G. Isaacson continuously maintained a residence separate and apart from the instant plaintiffs.

5-6. Denies to the extent that it is borne out by the judgment, which is the best evidence of its contents.

7. Denies the allegations contained in paragraph 7 for lack of knowledge or information sufficient to form a belief as to the truth thereof.

8-9. Admits the allegations contained in paragraphs 8 and 9.

10. Admits that plaintiffs filed a timely appeal to the Civil Service Commission's Appeals Review Board. Denies the remainder of paragraph 10 except to the extent borne out by the Appeals Review Board's decision, which is the best evidence of its contents.

11. Admits the allegations contained in paragraph 11.

12-17. Denies the allegations contained in paragraphs 12-17, inclusive.

18. Denies each and every allegation not heretofore admitted, denied, or otherwise qualified.

WHEREFORE, defendant prays that the petition herein be dismissed and that defendant be granted such other and further relief as may be just and proper.

REX E. LEE
Assistant Attorney General
Civil Division

DONNIE HOOVER
Attorney, Civil Division
Department of Justice

IN THE UNITED STATES COURT OF CLAIMS

No. 285-76

Filed Feb. 10, 1977

PATRICIA ILENE CLARK, LEGAL GUARDIAN OF SHAWN DOUGLAS CLARK AND TRICIA DEANNE CLARK, MINORS, AND SHAWN DOUGLAS CLARK AND TRICIA DEANNE CLARK INDIVIDUALLY, PLAINTIFFS

v.

THE UNITED STATES, DEFENDANT

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs hereby move pursuant to the provisions of Rule 101 of the Court of Claims Rules, for summary judgment herein on the ground there is no genuine issue as to any material fact and they are entitled to judgment as a matter of law. In support of their motion, plaintiffs rely on the pleadings herein and upon the brief filed herewith.

Wherefore, plaintiffs pray that this motion be granted and that judgment be entered in their favor against defendant ordering and directing defendant to pay all death benefits and survivor annuities owed to the minor plaintiffs herein as the lawful survivors of George Gerald Isaacson, deceased, under the Civil Service Retirement laws (5 U.S.C. 8301 et seq.), and that all amounts presently owed from and since the time of his death on August 17, 1964 be computed and paid without further delay.

/s/ Edward L. Merrigan
EDWARD L. MERRIGAN
Attorney for Plaintiffs
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Washington, D. C. 20015

IN THE UNITED STATES COURT OF CLAIMS

No. 285-76

PATRICIA ILENE CLARK, ET AL., PLAINTIFFS

v.

THE UNITED STATES, DEFENDANT

DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Oct. 3, 1977

Defendant submits the following brief in response to plaintiffs' motion for summary judgment filed February 10, 1977, in the above-captioned case. While defendant concedes that *Gentry* v. *United States*, Ct. Cl. No. 312-74 (decided November 17, 1976), is controlling as to the question of constitutionality, the instant case should nevertheless be remanded to the Civil Service Commission for the initial determination of liability and damages.

Argument

In their motion for summary judgment, the plaintiffs rely primarily upon this Court's decision in *Gentry* v. *United States*, Ct. Cl. No. 312-74 (decided November 17, 1976), and the Supreme Court's decision in *Jimenez* v. *Weinberger*, 417 U.S. 628 (1974). In *Gentry*, *supra*, this Court declared the live-with provision of 5 U.S.C. 8341 (a) (3) (A) (ii) unconstitutional.[1]

In view of this Court's decision in *Gentry*, *supra*, and the doctrine of *stare decisis*, defendant hereby concedes that said decision is controlling as to the question of constitutionality in the instant case. However, it should be noted that this concession is in no way to be con-

[1] This is the essence of the *Gentry* decision, notwithstanding the fact that the Court dismissed that portion of plaintiffs petition asking for a declaratory judgment of unconstitutionality of the live-with provision of the statute. (See *Gentry*, slip op. p. 20).

strued as a waiver of defendant's right to seek a writ of certiorari in either *Gentry, supra*, or the instant case.

With respect to the questions of liability and damages in the case at bar, defendant submits that this case should be remanded to the Civil Service Commission for its initial determination of these matters. As this Court recognized in *Gentry, supra*:

> The CSC, under 5 U.S.C. § 8347(b) and (c) (1970), is the sole, and final arbiter of 'all claims' such as factual questions of dependency, parentage, and recognition arising under the annuity statute.
>
> * * * *
>
> Here, . . . the statute commits basic factual determinations on which claims turn under the annuity statute to the CSC, and to it alone . . . . It would be improper to allow plaintiff to bypass this administrative procedure simply by the institution of suit.

Slip Op. at page 19.

Accordingly the instant case should be remanded to the CSC so that the Commission can carry out its statutory mandate as interpreted by this Court in *Gentry, supra*.

Conclusion

For the foregoing reasons, defendant respectfully requests that the instant case be remanded to the Civil Service Commission for the purpose of applying the legal determinations relative to the standards or guidelines established by the Commission in *Gentry, supra*, and of making the factual determination as to whether plaintiffs meet such criteria.

Respectfully submitted,

BARBARA ALLEN BABCOCK
Assistant Attorney General
Civil Division

DONNIE HOOVER
Attorney, Civil Division
Department of Justice

IN THE UNITED STATES COURT OF CLAIMS

No. 285-76

Jan. 27, 1978

SHAWN D. CLARK and TRICIA D. CLARK, Minors, by Patricia I. Clark, their Legal Guardian

v.

THE UNITED STATES

Before DAVIS, *Judge*, Presiding, KUNZIG, and BENNET, *Judges*.

ORDER

This is a suit, brought on behalf of Shawn D. Clark and Tricia D. Clark (minor children, plaintiffs), for recovery of death benefits and survivor annuities allegedly due them pursuant to the Civil Service Retirement Act of 1930, as amended. 5 U.S.C. §§ 8331-48 (1970). Upon the death of their father, George G. Isaacson, an employee of the Veteran's Administration, the children made timely application to the Civil Service Commission, Bureau of Retirement, Insurance and Occupational Health (BRIOH) for payment of benefits under 5 U.S.C. § 8341 (e). BRIOH denied their claim pointing to statutory language which required illegitimate children to have lived with their father in a "regular parent-child relationship" in order to qualify for survivor annuities.[1]

---

[1] 5 U.S.C. § 8341 provides, in pertinent part, as follows:

§ 8341. *Survivor annuities.*

(a) For the purpose of this section—

(3) "child" means—

[Footnote continued on page 26]

After the Civil Service Commission (CSC) Appeals Board affirmed the BRIOH determination,[2] the plaintiffs filed suit in this court. The matter is now before us on plaintiffs' motion for summary judgment.[3]

Subsequent to the filing of the instant case, this court has had occasion to deal with the precise statutory provisions now before us. In *Gentry* v. *United States*, 212 Ct.Cl. 1, 546 F.2d 343 (1976),[4] we held a portion of 5 U.S.C. § 8341 to be unconstitutional insofar as it discriminates between legitimate and illegitimate children solely on the basis of their status at birth. Since the Government now quite properly concedes that *Gentry*, *supra*, is dispositive of the case now before us, the only issue to decide is whether we should remand to the CSC as we did in *Gentry*.

Despite the Government's request that we remand to the CSC for further factual determination, it is not appropriate to do so in this case. In *Gentry*, it was necessary to determine "whether plaintiff is in fact the child

---

[1] [Continued]

> (A) * * * (ii) a stepchild or recognized natural child who lived with the employee or Member in a regular parent-child relationship;

[2] The CSC held that there was no "regular parent-child relationship" at the time of the father's death notwithstanding the following facts: George Isaacson was the father of both children, he had in fact lived with them and their mother under the same roof for some six years, he had thereafter been subject to a court decree to pay child support, and he had continued to provide child support until the time of his death.

[3] This court is aware of defendant's assertion that, after finding the children not eligible, CSC made an award of $7,755.12 to the father of George G. Isaacson. In 1976, defendant filed a contingent third party cross-motion against the father, but defendant has not followed up on its third party cross-motion, and it is not before the court on this motion for summary judgment.

[4] The case is also reported at 212 Ct.Cl. 27, 551 F.2d 852 (1977) (Order denying Defendant's Motion for Rehearing). Defendant, perhaps because of the compelling factual circumstances present in the case now before us (*see* note 2, *supra*), has apparently abandoned its contention (which it made on motion for rehearing in *Gentry*) that some determination as to "degree of dependency" might be necessary.

of the deceased annuitant and whether the latter recognized and supported him as such." *Gentry*, *supra* at 355. Here, on the other hand, there is no dispute over the facts of parentage, recognition, and support. Indeed, a prior, valid, judgment is conclusive on these points. *Clark* v. *Isaacson*, No. 5625 (Dist. Ct., 1st Dist. of Mont., Broadwater County, June 2, 1972). As there are thus no factual determinations to be made bearing on the right to recover, a remand to the CSC would serve no purpose.

In summary, on the uncontested facts of parentage, recognition, and support, plaintiffs have shown that they have a right to recover the benefits provided by 5 U.S.C. § 8341(e). Because this court has previously held a portion of 5 U.S.C. § 8341 to be unconstitutional insofar as it discriminates between legitimate and illegitimate children solely on the basis of their status at birth, and since there are no factual issues which require CSC determination, we hold that plaintiffs are entitled to recover the annuity provided by the statute.

Accordingly, IT IS HEREBY ORDERED, upon consideration of the pleadings and exhibits, without oral argument, that plaintiffs' motion for summary judgment is granted. Judgment is therefore entered for plaintiffs, and the cause is remanded to the Trial Division for further proceedings under Rule 131(c) to determine the amount to be awarded plaintiffs, consistent with this opinion.

BY THE COURT

Jan. 27, 1978

/s/ Oscar H. Davis
OSCAR H. DAVIS
Judge, Presiding

IN THE UNITED STATES COURT OF CLAIMS

No. 285-76

[Filed Aug. 11, 1978, Court of Claims]

PATRICIA ILENE CLARK, ET AL., PLAINTIFFS

v.

THE UNITED STATES, DEFENDANT

STIPULATION FOR THE ENTRY OF JUDGMENT

For the purpose of enabling the Court to render final judgment in this case, it is hereby stipulated by and between the attorneys for the parties hereto as follows:

1. By Order dated January 27, 1978, the Court of Claims granted the plaintiffs' motion for summary judgment, entered judgment on the issue of liability for plaintiffs, and remanded the case to the Trial Judge for further proceedings under Rule 131(c) to determine the amount to be awarded consistent with said order and judgment on liability of January 27, 1978.

2. Accordingly, it is hereby stipulated that the amount to be awarded to plaintiff Patricia Ilene Clark on behalf of Shawn Douglas Clark consistent with the order and judgment on liability of the Court herein dated January 27, 1978, is $7,081.33.

3. It is further stipulated that the amount to be awarded to plaintiff Patricia Ilene Clark on behalf of Tricia Deanne Clark consistent with the order and judgment on liability of the Court herein dated January 27, 1978, is $7,081.33.

4. It is further stipulated that the amounts reflected in Paragraphs 2 and 3 above are computed up to June 30, 1978, and that Shawn Douglas Clark and Tricia Deanne Clark shall be placed on the appropriate Civil Service annuity rolls for continued payments of the children's survivor annuity pursuant to 5 U.S.C. § 8341

(e), from June 30, 1978 and until their eligibility expires.

5. This stipulation is made for the purpose of enabling the Court to enter a final judgment in favor of the plaintiff, Patricia Ilene Clark, in her capacity as legal guardian for Shawn Douglas Clark and Tricia Deanne Clark, in the total amount of $14,162.66, provided the Court accepts this stipulation in its entirety. However, in the event this stipulation is rejected in whole or in part by the Court, it is agreed that this entire stipulation shall be void and of no effect whatsoever.

Respectfully submitted,

/s/ Edward L. Merrigan
EDWARD L. MERRIGAN
Attorney for Plaintiffs

/s/ Barbara Allen Babcock
BARBARA ALLEN BABCOCK
Assistant Attorney General
Civil Division

/s/ Donnie Hoover
DONNIE HOOVER
Attorney, Civil Division
Department of Justice

IN THE UNITED STATES COURT OF CLAIMS

No. 285-76

November 6, 1978

PATRICIA ILENE CLARK, LEGAL GUARDIAN OF SHAWN DOUGLAS CLARK AND TRICIA DEANNE CLARK, MINORS, AND SHAWN DOUGLAS CLARK AND TRICIA DEANNE CLARK INDIVIDUALLY, PLAINTIFFS

v.

THE UNITED STATES, DEFENDANT

and

GEORGE G. ISAACSON, THIRD-PARTY DEFENDANT

Before FRIEDMAN, *Chief Judge*, BENNETT and SMITH, *Judges*.

ORDER

This suit was brought on behalf of two minor children for recovery of death benefits and survivor annuities due them pursuant to 5 U.S.C. §§ 8331-8348 (1970). We granted plaintiffs' motion for summary judgment as to the liability question and remanded the case to the trial division for further proceedings under Rule 131(c) to determine the amount to be awarded plaintiffs. *Clark* v. *United States*, Ct. Cl. No. 285-76 (order, Jan. 27, 1978). The parties, on August 11, 1978, submitted a stipulation for the entry of judgment which we have reviewed and accept in its entirety.

On September 7, 1976, defendant moved the court, pursuant to Rule 41(a)(2), to summon George G. Isaacson as a contingent debtor in this case. By order dated September 23, 1976, the court allowed defendant's motion, issued said summons and filed defendant's contingent

cross-claim against the third party. The third party was personally served the summons by a U.S. Marshal and has failed to respond to defendant's claim.

The basis of defendant's contingent cross-claim was that defendant had made payment of $7,755.12 to the third party upon the finding that the above-named plaintiffs were not entitled to benefits. Upon our finding that the plaintiffs herein were entitled to the benefits, it is concluded that the third party was not entitled to the payment. Therefore, we grant judgment *pro confesso* under Rule 41(f) in favor of defendant against the third party.

IT IS THEREFORE ORDERED that defendant pay Patricia Ilene Clark, in her capacity as legal guardian, on behalf of Shawn Douglas Clark, the amount of $7,081.33 and, on behalf of Tricia Deanne Clark, the amount of $7,081.33, such amounts being those due and owing up to June 30, 1978.

IT IS FURTHER ORDERED that Shawn Douglas Clark and Tricia Deanne Clark be placed on the appropriate Civil Service Commission annuity rolls for continued payments of the children's survivor annuity, pursuant to 5 U.S.C. § 8341(e), from June 30, 1978, to the expiration of their eligibility.

IT IS FURTHER ORDERED that judgment be entered in favor of the United States against George G. Isaacson in the amount of $7,755.12.

BY THE COURT

/s/ Daniel M. Friedman
DANIEL M. FRIEDMAN
Chief Judge

SUPREME COURT OF THE UNITED STATES

No. 78-1513

UNITED STATES, APPELLANT,

v.

PATRICIA ILENE CLARK, GUARDIAN FOR
SHAWN D. CLARK AND TRICIA D. CLARK

APPEAL from the United States Court of Claims.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.

May 21, 1979

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1513

UNITED STATES OF AMERICA, *Appellant*

v.

PATRICIA ILENE CLARK, GUARDIAN FOR SHAWN D. CLARK AND TRICIA D. CLARK, MINOR CHILDREN, *Appellee*

On Appeal From the United States Court of Claims

APPELLEE'S MOTION TO AFFIRM JUDGMENT OF UNITED STATES COURT OF CLAIMS AND/OR TO DISMISS APPEAL

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May 2, 1979

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1513

UNITED STATES OF AMERICA, *Appellant*

v.

PATRICIA ILENE CLARK, GUARDIAN FOR SHAWN D. CLARK AND TRICIA D. CLARK, MINOR CHILDREN, *Appellee*

On Appeal From the United States Court of Claims

APPELLEE'S MOTION TO AFFIRM JUDGMENT OF UNITED STATES COURT OF CLAIMS AND/OR TO DISMISS APPEAL

Appellee, Patricia Ilene Clark, Guardian for Shawn D. Clark and Tricia D. Clark, minor children, hereby respectfully moves, in the alternative and pursuant to Rule 16 of the Supreme Court Rules, for an order which (a) affirms the judgment of the United States Court of Claims herein and/or (b) dismisses the appeal in this case on the following grounds:

1. The appeal should be dismissed because it is not within this Court's jurisdiction under 28 U.S.C. 1252.

2. The judgment of the United States Court of Claims should be affirmed because the questions actually presented for decision are manifestly unsubstantial and thus do not require further argument at this time.

3. The appeal should be dismissed and the judgment of the Court of Claims affirmed on the following additional grounds:

(i) It is settled by prior recent decisions of this Court that the United States Court of Claims has jurisdiction over money claims against the United States founded upon any Act of Congress (*United States* v. *King,* 395 U.S. 1, 89 S.Ct. 1501, 23 L.Ed.2d 52 (1969); *United States* v. *Testan,* 424 U.S. 392, 397-399, 96 S. Ct. 948, 952-953, 47 L.Ed.2d 114 (1976)); and this case plainly presents exclusively a money claim against the United States based on the Civil Service Retirement Act of 1930, as amended, 5 U.S.C. §§ 8331, et seq. Thus, the Government's contention that the Court of Claims did not have jurisdiction over this case is patently frivolous and unsustainable.

(ii) It is also settled by a line of prior recent decisions of this Court that it is unconstitutional and impermissible for federal or state laws to discriminate against illegitimate children of a father, otherwise eligible for statutory benefits, when the discrimination is not justified by any legitimate governmental interest, *especially in cases where the paternity relationship was established by a court of competent jurisdiction during the father's lifetime and where the father supported the children prior to his death.* (*Jimenez* v. *Weinberger,* 417 U.S. 628, 94 S.Ct. 2496, 41 L. Ed. 2d 363 (1974); *Trimble* v. *Gordon,* 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977); *Lalli* v. *Lalli,* —— U.S. ——, 99 S.Ct. 518, —— L.Ed.2d —— (1978).) Here, the undisputed facts establish that the deceased federal employee, who fathered the minor children seeking death benefits under the Civil Service Retirement Act, was formally decreed their father by a Montana court of competent jurisdiction during his lifetime, and that he thereafter supported said children pursuant to the Montana decree until his death. Under such circumstances, the children are clearly entitled to their father's death benefits under the federal statute involved, irrespective of whether they constantly physically lived with him under the same roof.

(iii) Almost five (5) full years have elapsed since August, 1974, when the federal employee-father involved in this case died and the minor children's claim for survivor benefits was timely and properly filed under the federal statute. Under the circumstances described above and hereinbelow, and in light of the settled law plainly applicable to cases such as this, it would be manifestly unjust and inequitable to permit the Government to delay and frustrate the day of final reckoning any longer, or to force the minor children involved to pursue further lengthy, costly litigation before this Court.

OPINIONS BELOW

The summary judgment rendered by the Court of Claims on January 27, 1978 is printed in *Appendix A* to the jurisdictional statement. The final money judgment thereafter entered on November 6, 1978 pursuant to the Government's stipulation is printed in *Appendix B* to the jurisdictional statement.

JURISDICTION

The Government's jurisdictional claim is predicated *exclusively* on 28 U.S.C. 1252. Appellee respectfully submits this Court does *not* have jurisdiction over this case under 28 U.S.C. 1252 for three (3) reasons:

1. The Government did *not* appeal from the Court of Claims' order or summary judgment of *January 27, 1978* (*App. A,* jurisdictional statement) under 28 U.S.C. 1252 *"within thirty days after the entry of* [*that*] *interlocutory or final order, judgment or decree"* in the manner prescribed by 28 U.S.C. 2101(a)—and no extension of that appeal time was sought from or granted by this Court or any Justice thereof.

2. The summary judgment granted by the Court of Claims on January 27, 1978 (*App. A,* jurisdictional statement) does *not invalidate* or *hold unconstitutional,* in whole or in part, any Act of Congress. Rather, pursuant to the Government's concession that a prior 1976 decision of the Court of Claims in *Gentry* v. *United States,* 212 Ct.Ct.1, 546 F.2d 343—*from which the Government took no appeal—"is dispositive of the case now before us,"* [1] the Court of Claims simply granted summary judgment in favor of the minor children for survivor benefits under 5 U.S.C. 8341(e), the Civil Service Retirement Act.[2]

3. The subsequent money judgment entered by the Court of Claims on November 6, 1978 *pursuant to the Government's stipulation,*[3] likewise does *not invalidate* or *hold unconstitutional* any Act of Congress, as required by 28 U.S.C. 1252. Rather, said order merely grants a money judgment in favor of the minor children and a third-party *pro confesso* judgment in favor of the United States against one George G. Isaacson, to whom the Civil Service Commission had previously erroneously and unlawfully paid survivor benefits.[4]

[1] See Jurisdictional Statement, *App.* A, pg. 3a.

[2] See Jurisdictional Statement, *App. A,* pgs. 3a, 4a.

[3] See *App. B,* jurisdictional statement, pg. 6a.

QUESTIONS PRESENTED

In truth and in fact, therefore, this case actually presents the following relatively unsubstantial questions for review:

1. Does this Court have jurisdiction over this particular case under 28 U.S.C. 1252 in view of (a) the Government's complete failure to file a timely appeal with reference to the Court of Claims' judgment and order of January 27, 1978, and (b) the fact that neither the Court of Claims' order and summary judgment of January 27, 1978 nor its subsequent "consent order" of November 6, 1978 in and of themselves actually invalidate or hold unconstitutional any Act of Congress?

2. Does the Court of Claims have jurisdiction under the Tucker Act (28 U.S.C. 1491) to render a money judgment based strictly on a money claim for statutory survivors' benefits under the Civil Service Retirement Act, as amended (5 U.S.C. § 8341(e))?

3. Is it permissible for the Civil Service Retirement Act to discriminate against illegitimate children of a deceased federal civil service employee by denying them statutory survivors' annuities to which they are other-

[4] Said third party, Mr. Isaacson, had stipulated in writing from the very outset of this case to refund the monies he had received if, as a matter of law, the minor children were entitled to the statutory benefits.

wise entitled solely because they did not constantly live with their deceased father under the same roof in a case where, during the lifetime of the father, a Montana court of competent jurisdiction decreed his paternity relationship to the children and pursuant to which the father supported said children to the time of his death?

STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. 1491, as here relevant, is set forth in the jurisdictional statement, at page 3.

2. The Civil Service Retirement Act, 5 U.S.C. 8341 (a)(4)(A), as here relevant, is likewise set forth in the jurisdictional statement, at page 3.

COUNTER-STATEMENT OF THE CASE

The Court of Claims' summary judgment in this case is based on the following undisputed facts:

Prior to his death on August 17, 1974, George G. Isaacson was a federal civil service employee employed by the Veterans Administration in Fort Harrison, Montana. Shawn Douglas Clark and Tricia Deanne Clark, his children and both of whom are minors, were born in 1968 and 1971 respectively. At the time of their births, their father, Mr. Isaacson, and their mother, Patricia Ilene Clark, appellee herein, were not married, and they were not subsequently married prior to Mr. Isaacson's death on August 17, 1974 in an automobile accident.

On June 2, 1972, however, more than two (2) years before Mr. Isaacson's death, a judgment was rendered by the District Court for the First Judicial District of Montana, County of Broadwater, in an action entitled *Patrcia Ilene Clark* v. *George G. Isaacson,* copy of which is *Appendix A* to this motion. The Montana judgment specifically decreed that *"the defendant, George Gerald Isaacson, is the father of Shawn Douglas Clark and Tricia Deanne Clark,"* and pursuant to a stipulation accepted by the Court, Mr. Isaacson was ordered in specific detail to support Shawn and Tricia through monthly payments and other means (see *App. A* hereto).

Accordingly, up to the time of his death in August, 1974, Mr. Isaacson regularly complied with the Montana decree and provided support payments and other benefits to his two children.

Shortly after Mr. Isaacson's death in 1974, appellee, as guardian of the two minor children, filed a timely, appropriate application with the Civil Service Commission's Bureau of Retirement, Insurance and Occupational Health seeking payment of the "Survivors' Annuities" prescribed by 5 U.S.C. 8341 for children of civil service employees who die without a surviving spouse (5 U.S.C. 8341(e)(1)). Under 5 U.S.C. 8341(a)(4), such annuities are payable to *any unmarried child* under 18 years of age, *including*—

> "(i) an *adopted* child, and
>
> "(ii) a *stepchild* or *recognized natural child* who lived with the employee . . . in a regular parent-child relationship." [Italics supplied.]

On September 27, 1974, however, the Commission's Bureau of Retirement, Insurance and Occupational Health denied appellee's claim on the ground that Shawn and Tricia "did not qualify for a survivor annuity since they did not live with the decedent in a regular parent-child relationship." The Bureau thus

directed that said annuity be paid to Mr. Isaacson's surviving father in one lump sum payment.

Appellee appealed to the Civil Service Commission's Board of Appeals and Review. On January 7, 1976, after an unconscionable delay, the Board affirmed the Bureau, stating in part:

> "The fact that an individual adjudged by a Montana court to be the father of illegitimate children is required by court order to support the children and name them as beneficiaries of life insurance policies is not dispositive of the issue of whether the children are legitimate or illegitimate . . . .
>
> "The Board notes appellant's argument that 5 U.S.C. 8341 is unconstitutional. However, until this provision of the retirement law is held unconstitutional by a court of competent jurisdiction, the Commission has no alternative but to continue its enforcement."

On July 9, 1976, therefore, appellee commenced the instant action in the United States Court of Claims demanding payment of the survivor's annuity lawfully owed to Shawn and Tricia under 5 U.S.C. 8341, and after the Government filed its answer, she moved for summary judgment.

On November 17, 1976, the Court of Claims rendered its judgment in another case, *Gentry* v. *United States,* 212 Ct.Cl.1, 546 F.2d 343 (1976), rehearing denied 212 Ct.Cl.27, 551 F.2d 852 (1977). In that case, the court ruled (a) it had full statutory jurisdiction under the Tucker Act (28 U.S.C. 1491) over claims for statutory survivor annuities unlawfully withheld by the Government under the Civil Service Retirement Act (5 U.S.C. 8341), and (b) that the *"live-with"* or *"residence"* requirement of 5 U.S.C. 8341(a)(4)(A) is *"severable*

from the legislative scheme of that statute, when read in light of the Fifth Amendment," because it conflicts with the overall aim of the statute, which is to aid dependents of federal employees; it does not promote any goal of preventing spurious claims; and it cannot be sustained as a recognizable aid to administrative convenience.

The Government failed to file or prosecute any appeal to this Court from the Court of Claims' judgment in *Gentry.* Indeed, in its jurisdictional statement in this case, the Government recognizes that *"Several other lower federal courts have declared the lived-with requirement [of 5 U.S.C. 8341] unconstitutional,"* and that none of those decisions have been disturbed by this Court, albeit the issue has been here before.[5]

Thus, in this case, after the decision in *Gentry,* the Government notified the Court of Claims that, in its view, *"Gentry, supra, is dispositive of the case now before us."* So, without discussing in the slightest any of the jurisdictional or constitutional issues settled by *Gentry,* the Court of Claims, on January 27, 1978, granted appellee's motion for summary judgment in this case, stating:[6]

> "In summary, on the uncontested facts of parentage, recognition and support, plaintiffs have shown that they have a right to recover the benefits provided by 5 U.S.C. § 8341(e)."

As indicated above, the Government filed *no* appeal from this judgment under 28 U.S.C. 1252 within the 30-day period prescribed by 28 U.S.C. 2101(a)—and

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[5] See Jurisdictional Statement, pg. 7, ftnt. 5.

[6] See Jurisdictional Statement, *App. A,* pg. 3a.

ultimately, after further unconscionable procrastination and delay, it agreed to stipulate without qualification to the entry of a money judgment in favor of Shawn and Tricia. That judgment issued on November 6, 1978. Then, and only then, did the Government file a Notice of Appeal on December 5, 1978. Still, it delayed the filing of its jurisdictional statement until April 4, 1979—*so that for almost five (5) full years, it has successfully deprived the two minor children involved in this case of their lawful annuity.*

Now, the Government advises this Court in its jurisdictional statement that, while it thus continues relentlessly and capriciously to press its malingering, baseless defense against Shawn and Tricia Clark,—[1]

> "OPM has recommended proposed legislation to the current Congress that it eliminate the lived-with requirement [from 5 U.S.C. 8341(a)(4)(A)] S. 509, 96th Cong. 1st Sess. (1979); H.R. 2584, 96th Cong., 1st Sess. (1979) . . . ."

ARGUMENT

I.

This Court Does Not Have Jurisdiction Over This Particular Case Under 28 U.S.C. 1252

A. No appeal was taken from the court of claims' judgment of January 27, 1978 for more than ten (10) months

28 U.S.C. 1252 provides that an appeal may be taken from either "an interlocutory or final judgment, decree or order . . . holding an Act of Congress unconstitutional in any civil action . . . to which the United States . . . is a party." 28 U.S.C. 2101(a), in turn, prescribes that the appeal to this Court under 28 U.S.C.

[1] See Jurisdictional Statement, pg. 10, ftnt. 8.

1252 *"shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree."*

In this case, whether the Court of Claims' summary judgment of January 27, 1978 be deemed "interlocutory" or "final," the Government took no appeal therefrom under 28 U.S.C. 2101(a) *for more than ten (10) months,* and it took no *timely* action to obtain any extension of time from this Court or a Justice thereof. *Ergo,* this Court is without jurisdiction and the appeal must be dismissed (*Whitsitt* v. *Union Depot & R.R. Co.,* 122 U.S. 363, 7 S.Ct. 1248, 30 L.Ed. 1150 (1887); *Glasgow Navigation Co., Ltd.* v. *Munson Steamship Line,* 246 U.S. 647, 38 S.Ct. 315, 62 L.Ed. 919 (1918); *Collard* v. *Pittsburgh, C.C. & St. L. Ry. Co.,* 246 U.S. 653, 38 S.Ct. 336, 62 L.Ed. 922 (1918); *Citizens Bank of Michigan City* v. *Opperman,* 249 U.S. 448, 39 S.Ct. 330, 63 L.Ed. 701 (1919); *Rust Land & Lbr. Co.* v. *Jackson,* 250 U.S. 71, 76, 39 S.Ct. 424, 63 L.Ed. 850 (1919); *Toledo Scale Co.* v. *Computing Scale Company,* 261 U.S. 399, 417, 418, 43 S.Ct. 458, 67 L.Ed. 719 (1923); *Hartford Accident & Indemnity Co.* v. *Bunn,* 285 U.S. 169, 175, 176, 52 S.Ct. 456, 76 L.Ed. 1301; *Matton Steamboat Co.* v. *Murphy,* 319 U.S. 412, 415, 63 S.Ct. 1126 (1943); *Cole* v. *Violette,* 319 U.S. 581, 63 S.Ct. 1204 (1943); *Parish* v. *Maryland and Virginia Milk Producers Association, Inc.,* —— U.S. ——, S.Ct. No. 78-1246 (1979)).

In *McLucas* v. *De Champlain,* 421 U.S. 21, 31, 95 S.Ct. 1365, 1371, 43 L.Ed.2d 699 (1975), this Court construed 28 U.S.C. 1252 to authorize and require *"immediate review in this Court,"* irrespective of the form of lower

court order which allegedly invalidates an Act of Congress. Mr. Justice Powell, writing for the Court, stated:

> "The language of the statute sufficiently demonstrates its purpose: to afford *immediate review* in this Court in civil actions to which the United States or its officers are parties and thus will be bound by a holding of unstitutionality. The purpose of § 1252 is too plain to allow circumvention . . . ."

Thus, even assuming *arguendo* that the Court of Claims' January 27, 1978 decision in this case was originally reviewable under 28 U.S.C. 1252 (when it was issued more than fifteen (15) months ago), it is no longer reviewable under that statute because no appeal was taken within thirty (30) days as mandated by 28 U.S.C. 2101(a).

B. This Court also lacks jurisdiction under 28 U.S.C. 1252 over either the Court of Claims' Judgment of January 27, 1978 or the Consent Order of November 6, 1978 because neither invalidates an Act of Congress, in whole or in part

As this Court stated in *McLucas* v. *De Champlain, supra,* the sole purpose of 28 U.S.C. 1252 is "to afford immediate review in this Court" in cases where the United States will be "*bound by a holding of unconstitutionality*" (421 U.S. 31). But here, the federal statute in issue (5 U.S.C. 8341(a)(4)(A)) was deemed partially violative of the Fifth Amendment in a completely separate case, *Gentry* v. *United States, supra,* in 1976—a decision rendered more than fourteen (14) months *before* the Court of Claims' initial ruling in this case in January, 1978—and, of course, the Government took *no appeal* from that 1976 judgment.

Moreover, the Government concedes that, in addition to *Gentry* and prior to the Court of Claims' judgment of January 27, 1978 in this case, "several other lower federal courts declared the live-with requirement unconstitutional"—and that again, either *no appeals* were taken or the appeal taken in one instance was ultimately fruitless.[8] Accordingly, the Government itself is now asking Congress to delete the "live-with" requirement from 5 U.S.C. 8341(a)(4)(A).

With this background, even a cursory reading of the Court of Claims' judgment of January 27, 1978 and its subsequent "consent order" of November 6, 1978 herein make it clear that neither *"invalidated"* or *"held unconstitutional"* an Act of Congress within the meaning or purpose of 28 U.S.C. 1252. On the contrary, the summary judgment of January 27, 1978 was based entirely on the Government's *concession* that *"Gentry, supra,* is dispositive of the case now before us"—and thus, without further ado, judgment was rendered in favor of Shawn and Tricia Clark on the basis of the Court's finding:[9]

> "In summary, on the uncontested facts . . . , plaintiffs have shown that they have a right to recover the benefits provided by U.S.C. § 8341(e)."

The subsequent "consent order" of November 6, 1978 was based on the Government's "stipulation for entry of judgment."[10]

Neither ruling by the Court of Claims discusses in the slightest the basis for the court's earlier holdings

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[8] See Jurisdictional Statement, pg. 7, ftnt. 5.

[9] See Jurisdictional Statement, *App. A*, pg. 3a.

[10] See Jurisdictional Statement, *App. B*, pg. 6a.

in *Gentry*. Such discussion was plainly unnecessary here, because the Government chose to acquiesce in a mere summary ruling on the merits in this case. Now, the Government which failed to appeal in *Gentry* in the manner prescribed by law, is trying belatedly and unjustly to appeal from *Gentry* in this case. Nothing in 28 U.S.C. 1252 or 28 U.S.C. 2101(a) authorizes any such procedure—indeed, the entire attempt is patently contrary to the whole purpose of 28 U.S.C. 1252 as defined by this Court in its recent decision in *McLucas* v. *De Champlain, supra.*

For all these reasons, appellee respectfully submits this Court does not have jurisdiction under 28 U.S.C. 1252 at this late date in 1979 over either the Court of Claims' 1976 rulings in *Gentry* or over the Court of Claims' January 27, 1978 summary judgment in this case, or over the mere "consent order" entered by stipulation in this case on November 6, 1978.

II.

The Court of Claims Plainly Had Jurisdiction Over the Money Claim for Survivors' Annuity Under the Civil Service Retirement Act

Throughout its entire history, since it was established in 1855, the Court of Claims has had jurisdiction over money claims against the United States based on an Act of Congress (*United States* v. *King,* 395 U.S. 1, 2-3, 89 S.Ct. 1501, 1502 (1969); *United States* v. *Testan,* 424 U.S. 392, 397-398, 96 S.Ct. 948, 953, 47 L.Ed.2d 114 (1976)). In this case, appellee's claim on behalf of the minor children is strictly a money claim for statutory survivors' annuity based on the Civil Service Retirement Act (5 U.S.C. 8341(e)). That Act of Congress *specifically* sets forth the *amounts of money* due and

payable to children of deceased federal employees (5 U.S.C. 8341(e)), and here the suit seeks collection of that *statutory debt* of the United States to Shawn and Tricia Clark, the children of a deceased civil service employee covered by that statute.

Their action asserts, and the Court of Claims has ruled, that the Act "confers a substantive right [on the Clark children] to recover money from the United States" (*United States* v. *Testan,* at 424 U.S. 398). And, of course, by expressly providing this statutory commitment to pay the survivors' annuity to children of deceased employees—even to *adopted children* and *stepchildren* (5 U.S.C. 8341(a)(4)(A)—the United States waived its sovereign immunity and made itself statutorily liable for such payments (*United States* v. *Testan,* at 424 U.S. 399).

Under the circumstances of this particular case, therefore, it is absolutely specious for the Government to argue that the Court of Claims either completely lacks jurisdiction over the statutory money claim here involved, or that somehow its jurisdiction should be limited to "prospective relief only"—i.e., the Court of Claims should be made powerless to award "monetary relief for past injury" (the survivors' annuity payable from the date of the deceased father's death in 1974 to the date of judgment in this case). *The Government cites no authority whatsoever for this novel, totally unjust contention other than its own brief before this Court in another case* (*Califano* v. *Boles,* No. 78-808).

Indeed, the very same contention was made by the Government in *Gentry* v. *United States, supra*—and it was soundly rejected by the Court of Claims in 1976 (see 546 F.2d 345-348). *The Government took no ap-*

peal from those jurisdictional rulings, now almost three (3) years old—and it completely failed to question the Court of Claims' jurisdiction in the proceedings below in this case. Rather, the Government stipulated for the entry of a money judgment under the governing retirement statute (Jurisdictional Statement, *App. B.).*

Patently, this bizarre jurisdictional argument was properly and soundly laid to rest in *Gentry,* and the Government's attempt to resurrect that dead issue now —in an entirely different case where it was never raised before—must be flatly rejected by this Court.

III.

In This Case, a Court of Competent Jurisdiction Ruled the Deceased Federal Employee Was the Father of the Minor Annuity Claimants and Ordered Him to Provide for Their Support—And He Did Support Them to the Time of His Death. Plainly, Therefore, the "Live-With" Provision of 5 U.S.C. 8341(a)(4)(A) Is Invalid Under the Fifth Amendment and All of This Court's Recent Rulings

As stated above, the Court of Claims made no constitutional rulings in this case, and it did not invalidate any Act of Congress, in whole or in part. Rather, it simply granted summary judgment in favor of the Clark children under 5 U.S.C. 8341 on the basis of the undisputed evidence presented in support of their claim and its earlier construction of 5 U.S.C. 8341 in

[11] As the Jurisdictional Statement recognizes in a footnote, at page 12, 28 U.S.C. 1491 specifically authorizes the Court of Claims to provide "an entire remedy." Here, the Court granted an appropriate money judgment under 5 U.S.C. 8341, so clearly it had the statutory authority under 28 U.S.C. 1491 to order the Civil Service Commission (now OPM) to place Shawn and Tricia on the annuity roles.

Gentry v. *United States, supra*—a construction from which the Government took no appeal.

But even assuming *arguendo* the Court of Claims' actions in this case could be construed as having adjudged the "live-with" provision of 5 U.S.C. 8341(a)(4)(A) violative of the Fifth Amendment in this particular litigation, patently that finding was correct and wholly in accord with this Court's recent decisions in *Jimenez* v. *Weinberger,* 417 U.S. 628, 94 S.Ct. 2496, 41 L.Ed.2d 363 (1974); *Trimble* v. *Gordon,* 430 U.S. 762, 97 S. Ct. 1459, 52 L.Ed.2d 31 (1977); and *Lalli* v. *Lalli,* —— U.S. ——, 99 S.Ct. 518 (1978).

The Government contends in its Jurisdictional Statement (pgs. 6-10) that the sole purposes of the aforesaid "live-with" provision are—

> (1) to assist the Government in determining whether surviving children of federal employees are actually *dependent* on that deceased parent; and
>
> (2) to assist the Government *"easily and promptly to identify eligible children."*

But here, the record shows that, in 1972, long before the death of the federal employee involved, a court of competent jurisdiction in Montana conclusively ruled (*Appendix A* hereto)—

> (i) that the deceased federal employee was the lawful father of Shawn and Tricia Clark; and
>
> (ii) pursuant to the deceased federal employee's *stipulation,* that henceforth he provide monthly support and medical care for Shawn and Tricia, *and that he name them as his beneficiaries in his Federal Employees Group Life Insurance Policy.*

The undisputed record before the Court of Claims shows further that, to the date of his death, the federal employee-father made the regular monthly support and medical payments and that he listed his children, Shawn and Tricia, as beneficiaries in his Federal Employees Group Life Insurance Policy.

Here, therefore, a conclusive Montana court decree establishes both (a) *that Shawn and Tricia were "actually dependent" on their deceased father for support and (b) that Shawn and Tricia are promptly and easily identifiable as the dependent children of their deceased father.*

Under circumstances such as these, the "live-with" provision of 5 U.S.C. 8341(a)(4)(A) is insidiously discriminatory and violative of the Fifth Amendment. It allows *legitimate children* annuities irrespective of where they live—and they are eligible even if they never lived with a divorced federal employee-father, for example. It also allows *"adopted children"* and *"stepchildren"* full annuities, simply because they physically "lived with" a deceased federal employee-foster father or stepfather, while as construed by the Government in this case, it would foreclose any annuity to two (2) minor children of the deceased employee here involved, who were clearly dependent on him for support and whom he supported, as ordered by Montana, to the date of his death—after having been judicially decreed their father.

And under similar circumstances, of course, this Court ruled an Illinois statute unconstitutional in *Trimble* v. *Gordon, supra,* because it discriminated against illegitimate children in an impermissible manner and because the statutory classification of *"children"* was not "substantially related to permissible state interests." In *Lalli* v. *Lalli, supra,* this Court referred to its ruling in *Trimble,* as follows, at 99 S.Ct. 524:

> "As illustrated by the facts in *Trimble* even a *judicial declaration of paternity* was insufficient to permit inheritance." [Italics supplied.]

And, in *Lalli* v. *Lalli, supra,* this Court upheld a New York statute as constitutional because it enabled illegitimate children freely to inherit from their deceased father if, *during his lifetime, paternity was established judicially* (see 99 S.Ct. 524-527).

In the case at bar, *paternity* was established by a Montana court *during the deceased father's lifetime.* That same decree *established the full dependency of Shawn and Tricia upon their lawful father for support—and he did support them to his death. Ergo,* here the Court of Claims was obviously correct when it ruled (Jurisdictional Statement, *App. A,* page 3a):

> "Here, on the other hand, there is no dispute over the facts of parentage, recognition, and support. *Indeed, a prior, valid judgment is conclusive on these points* . . . .
>
> "In summary, on the uncontested facts of parentage, recognition and support, plaintiffs have shown they have a right to recover the benefits provided by 5 U.S.C. § 8341(e)."

One last matter requires brief comment. The Jurisdictional Statement, at pages 9, 10, falsely implies that Shawn and Tricia filed *"a late claim"* for their annuity benefits under 5 U.S.C. 8341—as a result of which, the benefits were paid to the deceased employee's father. This is totally wrong. Almost immediately after their

father's death in August, 1974, appellee filed Shawn's and Tricia's claim with the Civil Service Commission. That claim was denied on September 27, 1974—just a little more than one (1) month after their father's death—solely because of the "lived-with" provision of 5 U.S.C. 8341(a)(4)(A). The Government thereupon erroneously paid the annuity to the deceased employee's father. But, from the very outset, the recipient grandfather agreed readily to refund the payment if the Government found Shawn and Tricia eligible in his place.

Finally, when the Court of Claims rendered its final "consent money judgment" in favor of Shawn and Tricia on November 6, 1978, it simultaneously entered a third-party *pro confesso* judgment against the grandfather directing that the erroneous payment be refunded, the Court having found that at no point did the grandfather oppose the Government's third-party claim. (Jurisdictional Statement, *App. B*).

Clearly, therefore, the Court of Claims' judgment should be affirmed in every respect, and the Government's astounding, misdirected Jurisdictional Statement and appeal must be dismissed.

IV.

The Government Has Already Deprived the Minor Children in This Case of Their Lawful Annuity for Almost Five (5) Years, and When It Finally Stipulated to Entry of Judgment in the Court of Claims, It Withdrew Its Previously-Asserted Reservation of Right to Appeal Therefrom to This Court. In Justice, Therefore, the Court of Claims' Judgment, Entered Pursuant to the Government's Stipulation, Should Be Summarily Affirmed Without Further Costly Litigation in This Court

Shawn and Tricia Clark lost their father, and the support he provided, in August, 1974—almost five (5) years ago. The Government, in turn, has succeeded in depriving them of their lawful statutory annuity year after year since their father's death—and now it is asking this Court to delay the day of final reckoning even longer.

In July, 1978, when the Government finally agreed to execute a stipulation for final money judgment in the Court of Claims, it originally sought to reserve the right to appeal to this Court from both the January 27, 1978 summary judgment and the November 6, 1978 consent judgment of the Court of Claims in this case. Counsel for appellee rejected the Government's proposed stipulation, reminding counsel for the Government that the time to appeal from the January 27, 1978 summary judgment had expired; and that the Government had indicated previously it did not intend to appeal from any consent judgment thereafter entered by the Court (*Appendix B* hereto).

The pending stipulation was thereupon redrafted to eliminate all references to reservations of right to appeal; it was executed by the Government and accepted by the Court (*Appendix C* hereto).

Under such circumstances, we submit, it would clearly be unjust and oppressive for this Court to entertain the Government's groundless appeal at this late date and thereby force Shawn and Tricia, minor children without the necessary means, to endure further costly litigation in this long-pending case.

CONCLUSION

The judgments of the Court of Claims should be affirmed and the appeal herein should be dismissed.

Respectfully submitted,

EDWARD L. MERRIGAN
Attorney For Appellee
6000 Connecticut Avenue, N.W.
Washington, D.C. 20015

APPENDIX

APPENDIX A

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BROADWATER

No. 5625

PATRICIA ILENE CLARK, *Plaintiff*,

v.

GEORGE GERALD ISAACSON, *Defendant.*

Findings of Fact, Conclusions of Law and Judgment

The above-entitled cause came on regularly for trial on the 15th day of May, 1972, before the Court sitting without a jury, Hubert J. Massman, of the Law Firm of Massman, Funk & Swanberg, Horsky Block, Helena, Montana, appearing as counsel for the Plaintiff, and Lloyd J. Skedd, 1225 Eleventh Avenue, Helena, Montana, appearing as counsel for the Defendant, and said action being tried on the 15th, 16th and 17th days of May, 1972, and evidence both oral and documentary having been introduced for and on behalf of the respective parties, and said cause having been duly submitted for decision, and the Court having considered the evidence and the law applicable thereto finds as facts the following:

Findings of Fact

1. That the Plaintiff, PATRICIA ILENE CLARK, is the mother of SHAWN DOUGLAS CLARK, who was born at St. John's Hospital, Helena, Montana, on April 13, 1968, and of TRICIA DEANNE CLARK, who was born at St. Peter's Hospital, Helena, Montana, on January 28, 1971;

2. That the Defendant, GEORGE GERALD ISAACSON, is the father of SHAWN DOUGLAS CLARK and TRICIA DEANNE CLARK, above described;

3. That GEORGE GERALD ISAACSON is regularly employed and is earning a gross annual salary in excess of Twelve Thousand Five Hundred and no/100 Dollars ($12,000.00), and that PATRICIA ILENE CLARK is regularly employed and is earning a gross annual salary in excess of Eight Thousand Five Hundred and no/100 Dollars ($8,500.00);

4. That the parties stipulated in open Court as follows:

(a) Defendant pay Plaintiff on or before the 1st day of June, 1972, the sum of Five Thousand and no/100 Dollars ($5,000.00) in full and final settlement of any and all past obligations of every kind and nature whatsoever.

(b) Defendant shall change the beneficiaries on the following policies to make SHAWN DOUGLAS CLARK and TRICIA DEANNE CLARK first beneficiaries:

(1) New York Life Insurance Policy for Ten Thousand and no/100 Dollars ($10,000.00);

(2) Federal Employees Group Life Insurance Policy for Fifteen Thousand and no/100 Dollars ($15,000.00).

(c) Defendant pay Plaintiff the sum of Sixty and no/100 Dollars ($60.00) per month for each of the said minor children, SHAWN DOUGLAS CLARK and TRICIA DEANNE CLARK, Ten and no/100 Dollars ($10.00) of which represents medical insurance coverage;

5. The Court finds that the stipulations of the parties are fair and reasonable under the circumstances of this case.

Conclusions of Law

1. That PATRICIA ILENE CLARK is the monther, and GEORGE GERALD ISAACSON is the father, of SHAWN DOUGLAS CLARK, born at St. John's Hospital in Helena, Montana, on April 13, 1968, and of TRICIA DEANNE CLARK, who was born in St. Peter's Hospital in Helena, Montana, on January 28, 1971.

2. That the stipulations of the parties, found reasonable and just by this Court, should be made a part of the Judgment in this cause.

Judgment

Upon the foregoing Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

(1) That the Defendant, GEORGE GERALD ISAACSON, is the father of SHAWN DOUGLAS CLARK, who was born in St. John's Hospital, Helena, Montana, on April 13, 1968, and of TRICIA DEANNE CLARK, who was born at St. Peter's Hospital in Helena, Montana, on January 28, 1971.

(2) That Defendant pay to the Plaintiff on or before the 1st day of June, 1972, the sum of Five Thousand and no/100 Dollars ($5,000.00) as full and final settlement of all past obligations between the parties of every kind and nature whatsoever.

(3) That Defendant pay to the Plaintiff, through the Clerk of the above-entitled Court, the sum of Sixty and no/100 Dollars ($60.00) per month for each of the said children (Ten and no/100 Dollars ($10.00) of which shall represent medical insurance costs for each child); said payments shall commence on the 1st day of June, 1972, and shall be paid on the 1st day of each month thereafter until such time as each of the said children shall reach their age of majority.

(4) That Defendant change the beneficiaries under the following policies to make SHAWN DOUGLAS CLARK and TRICIA DEANNE CLARK first beneficiaries, to-wit:

(a) New York Life Insurance Policy in the amount of Ten Thousand and no/100 Dollars ($10,000.00).

(b) Federal Employees Group Life Insurance Policy in the amount of Fifteen Thousand and no/100 Dollars ($15,000.00).

The change in beneficiaries herein ordered shall be subject to Court approval.

DATED this 2nd day of June, 1972.

/s/ GORDON R. BENNETT
District Judge

APPENDIX B

[LETTERHEAD OF EDWARD L. MERRIGAN, ATTORNEY]

July 31, 1978

Donnie Hoover, Esq.
Trial Attorney
Court of Claims, Section
Civil Division
U. S. Department of Justice
Washington, D. C. 20530

Re: Patricia Ilene Clark, et al.

Vs: United States Court of Claims No. 285-76

Dear Mr. Hoover:

Receipt of your letter of July 28 is hereby acknowledged. I am at a loss to understand why your recent correspondence to me was misdirected, and why now, at this late date, your proposed stipulation for judgment suddenly reserves the right to appeal or petition for certiorari.

Regarding the misdirected correspondence, all prior recent letters from you to me were correctly directed to 6000 Connecticut Avenue, N. W. Thus, certainly your file contains my correct mailing address.

With reference to the stipulation, it was my specific understanding that the Government had decided not to continue this long malingering litigation beyond entry of judgment in the Court of Claims. In this regard, the Government did not appeal or petition for certiorari with reference to the judgment entered in this case on January 27, 1978 within the prescribed statutory period. Secondly, when Judge Wood wrote to counsel on March 30, 1978 advising

that the Court's judgment of January 27, 1978 "has now become final," you specifically replied as follows:

> ". . . please be advised that the Civil Service Commission is prepared to make payments to the claimants herein. In this regard, the Commission is now in the process of making the necessary computations in the matter. Upon receipt of the aforementioned computation from the Commission, I believe that counsel for plaintiffs and myself will be able to stipulate to the entry of judgment.
>
> "Also, at that time, defendant will request that judgment be entered against Mr. George Isaacson based upon defendant's third party claim. However, this should not affect the plaintiffs' rights or entitlements in any way. Thus, no delay is anticipated as a result of defendant's third party claim.
>
> "Finally, I have been informed that the Commission needs approximately 30 days within which to complete its computation."

Now, more than 90 days later, you submit a stipulation which suddenly twice reserves the right to appeal or petition for certiorari.

Clearly, after final judgment is entered in this case, I cannot stop the Government from appealing or petitioning for certiorari if it intends to ignore its prior representations and albeit its statutory right to apply for review of the substantive judgment of January 27, 1978 has clearly expired. But, certainly under the circumstances present here I do not intend to sign a stipulation so providing. Thus, I have redrafted the proposed stipulation so as to eliminate all references to the Government's asserted right to appeal or petition for certiorari. If the Government still has such rights as a matter of law, or if it intends to endeavor to assert such rights contrary to its prior represen-

tations herein, it may do so without the benefit of my stipulation.

Accordingly, please let me hear from you immediately upon receipt of this letter and the enclosed redrafted stipulation as to whether you are prepared to sign and file same as redrafted. If so, please send me an executed copy. If not, I will have to apply to Judge Wood for entry of judgment based on the Civil Service Commission's computations, which you have certified as being true and correct.

Looking forward to your immediate advice, I am,

Very truly yours,

/s/ Edward L. Merrigan

ELM/rl
Enclosure

cc: Judge Wood

APPENDIX C

IN THE UNITED STATES COURT OF CLAIMS

No. 285-76

PATRICIA ILENE CLARK, *et al., Plaintiffs,*

v.

THE UNITED STATES, *Defendant.*

Stipulation for the Entry of Judgment

For the purpose of enabling the Court to render final judgment in this case, it is hereby stipulated by and between the attorneys for the parties hereto as follows:

1. By Order dated January 27, 1978, the Court of Claims granted the plaintiffs' motion for summary judgment, entered judgment on the issue of liability for plaintiffs, and remanded the case to the Trial Judge for further proceedings under Rule 131(c) to determine the amount to be awarded consistent with the order and judgment on liability of the Court herein dated January 27, 1978, is $7,081.33.

3. It is further stipulated that the amount to be awarded to plaintiff Patricia Ilene Clark on behalf of Tricia Deanne Clark consistent with the order and judgment on liability of the Court herein dated January 27, 1978, is $7,081.33.

4. It is further stipulated that the amounts reflected in Paragraphs 2 and 3 above are computed up to June 30, 1978, and that Shawn Douglas Clark and Tricia Deanne Clark shall be placed on the appropriate Civil Service annuity pursuant to 5 U.S.C. § 8341(e), from June 30, 1978 and until their eligibility expires.

5. This stipulation is made for the purpose of enabling the Court to enter a final judgment in favor of the plaintiff, Patricia Ilene Clark, in her capacity as legal guardian for Shawn Douglas Clark and Tricia Deanne Clark, in the total amount of $14,162.66, provided the Court accepts this stipulation in its entirety. However, in the event this stipulation is rejected in whole or in part by the Court, it is agreed that this entire stipulation shall be void and of no effect whatsoever.

Respectfully submitted

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Supreme Court, U. S.
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MAY 4 1979
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MAY 17 PAGE 1

In the Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1513

UNITED STATES OF AMERICA, APPELLANT

v.

PATRICIA ILENE CLARK, GUARDIAN FOR
SHAWN D. CLARK AND TRICIA D. CLARK

ON APPEAL FROM THE UNITED STATES
COURT OF CLAIMS

BRIEF OF BARBARA JENKINS, AMICUS CURIAE IN SUPPORT OF APPELLEE

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In the Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1513

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v.

PATRICIA ILENE CLARK, GUARDIAN FOR SHAWN D. CLARK AND TRICIA D. CLARK

ON APPEAL FROM THE UNITED STATES COURT OF CLAIMS

BRIEF OF BARBARA JENKINS, AMICUS CURIAE IN SUPPORT OF APPELLEE

I. INTEREST OF THE AMICUS CURIAE

Barbara Jenkins, amicus curiae is the plaintiff in Jenkins v. United States Civil Service Commission, 460 F.Supp. 611 (D.D.C. 1978), appeal pending, No. 79-1199 (D.C. Cir.). Jenkins is a constitutional

challenge to the same provision of the Civil Service Retirement Act that is at issue here. Plaintiff Jenkins seeks -- and has been awarded by the district court -- full retroactive benefits for her son and for a nationwide class of children similarly situated.

Jenkins has an interest in Clark because she challenges the same statutory provision as the Clark plaintiffs and because resolution of her own lawsuit may be delayed while Clark is under consideration by this Court. The Civil Service Commission has moved in both the district court and the court of appeals in Jenkins for stays of further proceedings until Clark is resolved. These motions are pending.

While seeking to stay Jenkins pending resolution of Clark, the United States nevertheless observes that

the Clark children may be members of the Jenkins class, Jurisdictional Statement, p. 12, fn. 12.

II. THE FEDERAL QUESTION PRESENTED IS SO INSUBSTANTIAL THAT THE JUDGMENT BELOW SHOULD BE AFFIRMED OR, ALTERNATIVELY, THE APPEAL SHOULD BE DISMISSED.

A. COURTS HAVE UNANIMOUSLY AND REPEATEDLY DECLARED THE CHALLENGED PROVISION UNCONSTITUTIONAL.

The United States contends that the provision of the Civil Service Retirement Act which restricts survivor annuity benefits to those "illegitimate" children who "lived with" the Civil Service employee or Member in a "regular parent-child relationship" is constitutional. 5 U.S.C. §8341(a)(3)(A). This argument that the residency requirement is constitutional is plainly insubstantial.

As the United States concedes in its Jurisdictional Statement, p.7, fn. 5, "Several other lower federal courts have declared the lived-with requirement unconstitutional." In fact, the lower courts have been unanimous in their holdings that the residency requirement cannot withstand constitutional challenge.

At this point, no fewer than four courts, in addition to Clark and Jenkins, have found the challenged provision unconstitutional. Gentry v. United States, 546 F.2d 343 (Ct.Cl. 1976), reh. denied 551 F.2d 852 (1977), Myers v. Hampton, No. 8682 (S.D. Ohio, August 8, 1977, Myers II; September 18, 1973, Myers I); Tenny v. United States, 441 F.Supp. 224 (E.D. Mo. 1977); Proctor v. United States, 448 F.Supp. 418 (D.D.C.

1977) (three-judge district court).

Not a single judge in a single court considering this issue has ruled in the United States' favor.

So clear is the law on the constitutional issue that the Myers court ruled that it was not necessary to convene a threejudge district court to consider the constitutional question. The Myers court, in its September 18, 1973 decision, stated:

> In view of the clear thrust of recent federal decisions analyzed below, this court will accept the invitation extended to a single district judge in Bailey v. Patterson, 369 U.S. 31 (1962) and recently accepted by the chief judge of this district in Doe v. Brown, (#73-46, S.D.OH E.D., Kinneary) to declare a statute unconstitutional where any defense would be clearly frivolous.

> As Judge Friendly observed, "Congress could not have intended to require three judges to be assembled when decision could not possibly go in any way save one." Utica Mut. Ins. Co. v. Vincent, 375 F.2d 129, 131 n.1, cert. denied 389 U.S. 389 (1967), quoted in Charles Allen Wright, Law of Federal Courts 192 (1970).

The court found the Civil Service Commission's defense of the "live with" requirement "clearly frivolous."

Moreover, the United States has acquiesced in the repeated findings of unconstitutionality of the challenged provision. The earlier holdings of unconstitutionality cited above were not appealed to the Supreme Court by the United States. The Government filed a notice of appeal in Myers II in 1977, but then elected not to file a Jurisdictional Statement in January, 1978,

thereby abandoning its argument that the challenged provision is constitutional.

In Jenkins, the Government's concession on unconstitutionality was more explicit. On June 16, 1978, in response to a direct court order to state its position on constitutionality, the Government filed a Statement in Response to Court's Order of June 6, 1978, which, while ambiguously worded, resolved the constitutional issue in plaintiff's favor. While the Government wrote:

> Defendants do not concede the unconstitutionality of the aforementioned provision. They will not, however, assert the constitutionality of that provision in this litigation.

the parties and the Court thereafter treated the constitutional issue as

conceded. In its memorandum decision November 9, 1978, granting plaintiff summary judgment, the district court observed, "The defendants do not defend the constitutionality of the provision." 460 F.Supp. at 612.

The United States may not reasonably now argue -- after more than five years of litigation and six unanimous court decisions against it -- that the unconstitutionality of the residency requirement is in serious dispute. 1/

1/ The fact that the Government has proposed legislation to the present Congress to eliminate the "lived with" requirement (Jurisdictional Statement, p.10, fn. 8) undercuts its insistence upon the utility of and necessity for such a requirement and certainly in no way supports its argument that the requirement is constitutional.

B. THE LOWER COURTS FOLLOWED THE CLEAR DIRECTION OF THIS COURT IN FINDING THE CHALLENGED PROVISION UNCONSTITUTIONAL.

In uniformly ruling for the "illegitimate" children in their decisions, the lower courts carefully and properly analyzed the decisions of this Court concerning "illegitimacy." The Court repeatedly held that the "lived with" requirement is unconstitutional because it fails to provide certain "illegitimate" children with any opportunity to prove their membership in the group whom the Civil Service Retirement Act was intended to serve and, instead, automatically and conclusively disqualifies them from receiving benefits. These unanimous findings of unconstitutionality are in accord with this Court's holdings in Jimenez

v. Weinberger, 417 U.S. 628 (1974) and Mathews v. Lucas, 427 U.S. 495 (1976).

C. NO RECENT DECISIONS OF THIS COURT ALTER THE JUDICIAL CONSENSUS THAT THE "LIVE WITH" REQUIREMENT IS UNCONSTITUTIONAL.

The United States asserts that "further developments" in the law since Mathews v. Lucas now make it appropriate to appeal the Clark decision. The Government relies on Lalli v. Lalli, ____U.S. ____, 99 S.Ct. 518 (1978).

Lalli has no relevance to this appeal. Lalli involved a challenge to New York's inheritance law, which allows "illegitimate" children to inherit from their fathers by intestate succession only if the children can provide a particular form of proof of paternity (i.e.,

a judicial order of filiation issued during the lifetime of the father.)

In sustaining New York's intestacy statute, this Court recognized the substantial state interest in providing for the just and orderly disposition of property on death. This state interest, the Court held, distinguished Lalli from Jimenez and other cases disallowing classifications based on "illegitimacy" where no similar substantial state interest in property disposition on death is present. 99 S.Ct. at 525, fn. 6.

The Government implies in its Jurisdictional Statement that the "lived with" requirement serves a similar federal interest in securing finality in the survivor annuity

program. Jurisdictional Statement, p. 9. The Government points to the statutory provision authorizing eligible children to apply for benefits for up to 30 years after becoming eligible, 5 U.S.C. §8345 (h)(2), and argues that since beneficiaries receive retroactive payments to the day after the parent's death, 5 U.S.C. §§ 8341(e)(2) and 8345, "disruption" of the program occurs where "illegitimate" children apply for benefits many years after the parent's death.

Any such "disruption" caused in the operation of the survivor annuity program is caused by the statute, which authorizes applications to be made from all survivors for the full 30 year period. "Legitimate"

children may well apply for benefits many years after their parent's death. These children will be granted full retroactive benefits and any adjustments in payments to other beneficiaries will be made. The fact that the law contemplates an extended applications period by all survivors does not support denying benefits to one sub-group of survivors -- non-resident "illegitimate" children.

Moreover, even if Lalli is relevant to Clark, the Lalli decision lends substantial support to appellee's and amicus' position that the "lived with" requirement is unconstitutional. The Lalli court held that the single requirement imposed by the challenged law is simply an evidentiary requirement and that states are free to prescribe

any formal method of proof which "would assure the authenticity of the acknowledgement [of paternity]," 99 S.Ct. at 526, fn. 8. In so ruling, the Court distinguished Trimble v. Gordon, 430 U.S. 762 (1977), which overturned an Illinois intestacy statute that required, in addition to the father's acknowledgment of paternity, the legitimation of the child through the intermarriage of the parents. Lalli upheld a statute requiring only a prescribed demonstration of paternity; Trimble rejected a statute requiring demonstration of paternity plus intermarriage.

The Civil Service Retirement Act's "lived with" provision, like the Illinois law rejected in Trimble, imposes a requirement on

"illegitimate" children which is not related to a demonstration of parenthood. The "lived with" requirement is a burden to the applications process which bears no relationship to assuring the "authenticity of acknowledgment." Trimble and Lalli, properly viewed, both require a finding that the "lived with" requirement is unconstitutional.

The Government seeks to sustain the residency requirement in a two-step argument. First it contends that the Civil Service Retirement Act "is designed to assist the dependents of a deceased civil servant." Jurisdictional Statement, p.6. No authority for this proposition is cited. At least two courts have held that the Act is intended to provide benefits not only to dependents but

also to "surviving members of the immediate family of the annuitant, without regard to dependency." Gentry, 546 F.2d at 353; Jenkins, 460 F.Supp. at 613. The Government's statement of the purpose of the Act is too limited and overlooks the interests of a large number of the Act's intended beneficiaries.

Second, the Government contends that the residency requirement is a reasonable way of determining factual dependency. Lucas and Jimenez, however, instruct that a statute may lawfully discriminate against "illegitimate" children only if the children are given fair opportunity under the terms of the statute to demonstrate that they are in the

class for whom the statute was designed before they are conclusively denied benefits. The Act's failure to permit such proof of entitlement by those children not statutorily presumed entitled to benefits makes the Act defective.

Trimble and Lalli do not hold otherwise. Lalli specifically states that the Illinois statute was rejected in Trimble because "The reach of the statute was far in excess of its justifiable purpose." 99 S.Ct. at 527. The New York law, requiring only a specified form of proof of paternity, did not similarly exceed the justifiable purposes of the New York intestacy law and was thus sustained.

The "live with" requirement

of the Civil Service Retirement Act, assuming the Act is intended to serve only surviving dependents, far exceeds its justifiable purpose. Non-residency is not necessarily correlated with the lack of dependency. Many children may reside with one parent and yet be dependent upon the other parent for support. Any justifiable purpose in assuring that only dependent children receive survivor annuity benefits is not served by the residency requirement.

III. CONCLUSION

No substantial federal question is raised in this appeal. The six lower courts considering the constitutionality of the Civil Service Retirement Act's residency requirement

have properly analyzed the decisions of this Court concerning "illegitimacy" in unanimously declaring the law unconstitutional. The recent Lalli decision signals no change in the applicable law.

Amicus respectfully urges the Court to affirm the decision below, or, alternatively, to dismiss the appeal for want of a substantial federal question.

Respectfully submitted.

Edward C. King

May 1979

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No. 78-1513

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, APPELLANT

v.

PATRICIA ILENE CLARK, GUARDIAN FOR SHAWN D. CLARK AND TRICIA D. CLARK

ON APPEAL FROM THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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ON APPEAL FROM THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the Court of Claims (J.S. App. 1a-7a) are not reported.

JURISDICTION

The final judgment of the Court of Claims (J.S. App. 5a-7a) was entered on November 6, 1978. A notice of appeal was filed on December 5, 1978 (J.S. App. 8a). On January 29, 1979, the Chief Justice

extended the time for docketing the appeal to and including April 4, 1979, and the appeal was docketed on that date. On May 21, 1979, this Court postponed further consideration of its jurisdiction to the hearing of the case on the merits. The jurisdiction of this Court rests on 28 U.S.C. 1252. See pages 12-17, *infra*.

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction over this appeal.

2. Whether sovereign immunity bars the award of retroactive monetary relief to persons denied benefits under a statute later held unconstitutional.

3. Whether 5 U.S.C. 8341(a)(3)(A), a part of the Civil Service Retirement Act, violates the Due Process Clause of the Fifth Amendment by permitting illegitimate children of a deceased federal employee to recover survivors' annuities only if they "lived with the employee * * * in a regular parent-child relationship."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

2. 5 U.S.C. 8341 provides in pertinent part:

> (a) For the purpose of this section—
>
> * * * * *

> (3) "child" means—
>
> (A) an unmarried child under 18 years of age, including (i) an adopted child, and (ii) a stepchild or recognized natural child who lived with the employee or Member in a regular parent-child relationship * * *.
>
> * * * * *
>
> (e)(1) If an employee or Member dies * * * and is survived by a spouse, each surviving child is entitled to an annuity equal to the smallest of—
>
> (A) 60 percent of the average pay of the employee or Member divided by the number of children;
>
> (B) $900; or
>
> (C) $2,700 divided by the number of children.
>
> * * * * *
>
> If the employee or Member is not survived by a spouse, each surviving child is entitled to an annuity equal to the smallest of—
>
> (i) 75 percent of the average pay of the employee or Member divided by the number of children;
>
> (ii) $1,080; or
>
> (iii) $3,240 divided by the number of children.

3. 5 U.S.C. 8345 provides in pertinent part:

> (a) Each annuity is stated as an annual amount, one-twelfth of which, fixed at the nearest dollar, constitutes the monthly rate payable on the first business day of the month after the month or other period for which it has accrued.
>
> * * * * *

(f) * * *

(2) Notwithstanding any other provision of this subchapter, other than this subsection, the monthly rate of annuity payable under subsection (a) of this section to a surviving child shall not be less than the smallest primary insurance amount, including any cost-of-living increase added to that amount, authorized to be paid from time to time under title II of the Social Security Act, or three times such primary insurance amount divided by the number of surviving children entitled to an annuity, whichever is the lesser.

4. 28 U.S.C. 1252 provides in pertinent part:

Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, * * * holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.

5. 28 U.S.C. 1491 provides in pertinent part:

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort * * *. To provide an entire remedy and to complete the relief afforded by

the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just * * *.

STATEMENT

1. The Civil Service Retirement Act, 5 U.S.C. 8331 *et seq.*, provides benefits to specified federal civilian employees and Members of Congress. 5 U.S.C. 8331(1) and (2). These benefits include retirement, disability, and survivors' benefits (5 U.S.C. 8336-8341); in addition, a lump sum is paid to a surviving beneficiary designated by the employee if he leaves no survivors entitled to an annuity (5 U.S.C. 8342). Survivors' annuities are paid to the spouse and children of the deceased employee (5 U.S.C. 8341(b)(e)).[1] The statute provides that a "child" is an unmarried child under 18 years of age, "including" an adopted child and "a stepchild or

[1] The size of the child's annuity is equivalent to the lesser of the current minimum primary insurance amount payable under Social Security (see 42 U.S.C. 415(a)) or three times that amount divided by the number of entitled children. 5 U.S.C. 8345(f)(2). The lower ceilings provided by 5 U.S.C. 8341(e) have, in practical effect, been repealed by Section 8345(f)(2).

recognized natural child who lived with the employee or Member in a regular parent-child relationship" (5 U.S.C. 8341(a)(3)).[2]

The Civil Service Commission (now the Office of Personnel Management (OPM))[3] has interpreted this statutory provision as meaning that a recognized illegitimate child of a deceased employee is a statutory "child" only if he was sharing a common roof with the employee at the time of his death in circumstances that indicate a regular parent-child relationship, or that any interruption in this common domicile at the time of death was expected to be temporary. (A. 6-7). Federal Personnel Manual Supp. 831-1, subchapter S17-2(e). See also *Proctor* v. *United States*, 448 F. Supp. 418, 421-422, 426 (D.D.C. 1977).

2. George G. Isaacson, a covered federal employee, died in an automobile accident in August 1974. He was unmarried, and he had designated his father as the beneficiary entitled to the lump-sum payment of his benefits. In September 1974 Patricia Clark applied for children's benefits for Shawn and Tricia Clark, Isaacson's illegitimate children. Their paternity was established by a state court decree dated June 2, 1972, ordering Isaacson to contribute to appellees' support (Motion to Affirm App. 1a-4a). The Civil Service Commission's Bureau of Retirement Insurance and Occupational Health (BRIOH) denied the application for children's benefits because Shawn and Tricia were not living with Isaacson in a parent-child relationship at the time of his death (A. 4).[4] The Commission's Board of Appeals and Review affirmed this decision, finding that "decedent did not live in a parent-child relationship with the Clark children from at least 1972 until the date of his death in 1974" (A. 7). The Board noted the contention that the statutory lived-with requirement is unconstitutional, but it held that it is not empowered to consider such arguments (A. 9).[5]

Appellees sought review of the decision in the Court of Claims, invoking its jurisdiction under 28 U.S.C. 1491. They maintained that 5 U.S.C. 8341, as applied to deny benefits to illegitimate children because they were not living with the decedent at the time of his death, violated the equal protection component of the Due Process Clause of the Fifth Amendment (A. 18).[6] In response to appellees' motion for summary

[2] A person incapable of self-support by reason of a mental or physical disability, or a student under 22, also may be a "child" (5 U.S.C. 8341(a)(3)).

[3] As a result of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, and Reorganization Plan No. 2 of 1978, 43 Fed. Reg. 36037, the Civil Service Commission was abolished effective January 1, 1979, and its functions were divided among several agencies. The Office of Personnel Management assumed primary responsibility for the retirement program for civil servants.

[4] A lump-sum payment accordingly was made to Isaacson's father, his designated beneficiary (A. 4).

[5] The Board also rejected the contention that the state court support order legitimated Shawn and Tricia by operation of Montana state law (A. 7-9). Appellees have not pressed that contention here (Motion to Affirm 5-6, 18-19).

[6] Shawn and Tricia also contended that Isaacson had lived with them "from and after the children's respective births"

judgment the government conceded that *Gentry* v. *United States*, 546 F.2d 343 (Ct. Cl. 1976), controlled in that court the question whether the lived-with requirement of Section 8341 is constitutional.[7] It accordingly suggested that the case be remanded so that the agency could consider whether Shawn and Tricia were entitled to benefits under the holding of *Gentry* (A. 23-24).[8]

The Court of Claims granted summary judgment against the government, relying on its decision in *Gentry*. It concluded that there was no need for a remand to the agency; it stated that there was "no dispute over the facts of parentage, recognition, and support * * * [because] a prior, valid, judgment is conclusive on these points" (J.S. App. 3a),[9] and it

(A. 12), had openly acknowledged them, and had complied with the state court's support order consistently until his death (A. 17).

[7] This response stated that the concession "is in no way to be construed as a waiver of [the government's] right to seek a writ of certiorari" in this case (A. 23-24).

[8] The United States also filed a contingent third party claim against George Isaacson, decedent's father and designated beneficiary, seeking the return of the lump-sum payment made to him.

[9] The Court of Claims' assertion is not supported by the record. The Montana judgment is not "conclusive" on the United States, which was not a party. And it does not show that Isaacson in fact supported Shawn and Tricia. They maintain that Isaacson contributed to their support in compliance with the state court order (see, *e.g.*, A. 13, 17; Motion to Affirm 7, 18, 19), but neither the BRIOH nor the Appeals Board considered whether their contentions are correct. No agency has determined that Isaacson was paying the required support, and the Court of Claims' record is barren on that matter.

remanded the case to the trial division for determination of the amount to be awarded (J.S. App. 3a-4a).

The parties stipulated, "for the purpose of enabling the Court to render a final judgment" (A. 28), that the amount due each child on June 30, 1978, was $7,081.33, and that they are entitled to be placed on the annuity rolls for continued payments from that date. The Court of Claims entered its final judgment on November 6, 1978, requiring the Commission to pay the stipulated amounts and to place Shawn and Tricia on its annuity rolls effective June 30, 1978 (J.S. App. 5a-7a).[10]

SUMMARY OF ARGUMENT

I

This Court may consider the questions presented, despite the government's decision not to appeal from the interlocutory decision determining liability, in accordance with the general rule that an appellate court has jurisdiction to consider the entire case on appeal from a final judgment. The fact that 28 U.S.C. 1252 *permits* the government to appeal from interlocutory orders of the Court of Claims does not

[10] Shawn and Tricia Clark accordingly have been receiving annuities since June 30, 1978; each child currently receives $187 a month.

The court also granted the government's cross claim against decedent's father and entered judgment in favor of the United States for $7,755.12, the lump sum previously paid to him (J.S. App. 7a). Isaacson's father has not sought review of this judgment.

mean that it *must* do so, and the strong policy reasons for discouraging piecemeal review support this Court's consistent refusal to read any such requirement into similar statutes permitting interlocutory review. Moreover, the order below was one "holding an Act of Congress unconstitutional" from which a direct appeal to this Court lies under 28 U.S.C. 1252. The decision, requiring the payment of benefits to Shawn and Tricia Clark, was necessarily based on the holding that the statutory condition of entitlement, which they could not meet, was unconstitutional. It is not jurisdictionally significant that the court also reached that decision in an earlier case. Nothing in 28 U.S.C. 1252 limits a direct appeal to the *first* decision of a court holding a particular statutory provision unconstitutional.

II

The Court of Claims has jurisdiction over claims against the United States founded on statutes or the Constitution; it may enter judgments for money due and provide appropriate ancillary relief. Because Shawn and Tricia Clark had no statutory or constitutional claim for money due, the court had no ancillary jurisdiction to require the prospective payment of benefits to them. The children's annuity provision of the Civil Service Retirement Act gave them no statutory claim: indeed, the very reason the Court of Claims held the provision unconstitutional was because it foreclosed their claims. No right to retroactive benefits is accorded by any other provision of

the Civil Service Retirement Act or by the Tucker Act. And the Constitution does not require or authorize an award of money damages to remedy an unconstitutional denial of benefits. In the absence of any express authorization for such payments, the doctrine of sovereign immunity forbids the award of money in cases such as this. The Court of Claims therefore should have dismissed the case for want of jurisdiction even if the statute is unconstitutional.

III

The Court of Claims' decision on the merits also is incorrect. The requirement that illegitimate children must show that they were living with the wage-earner when he died in order to qualify for survivors' benefits bears an evident and substantial relationship to appropriate statutory goals. This Court's decisions involving classifications based on illegitimacy require no more. The Civil Service Act is a typical social insurance system designed to replace support lost by a wage-earner's dependents when he dies or retires; the classes of dependents most likely to have lost support are defined by categorical rules, rather than case-by-case adjudications of actual dependence. The lived-with requirement for illegitimates is a reasonable categorical rule: those illegitimate children who can meet that requirement are substantially more likely as a class to have lost support than the illegitimate children who cannot. The statutory classification is accordingly constitutional under the rationale of *Jimenez* v. *Weinberger*, 417 U.S. 628 (1974), and *Mathews* v. *Lucas*, 427 U.S. 495 (1976).

In addition, the lived-with requirement serves a reasonable statutory purpose by minimizing the difficulty of establishing the paternity of illegitimate children. The children who were living with the wage-earner when he died will almost always be readily identifiable; in contrast, an assertion that an illegitimate was recognized by the decedent at some time, and even received support from him, is more difficult to evaluate and more likely to be raised after the survivors entitled to an annuity have been initially determined. Thus, the lived-with requirement facilitates the prompt and accurate determination of entitlement to benefits.

ARGUMENT

I

THIS COURT HAS JURISDICTION OVER THIS APPEAL

Appellees contend that this Court lacks jurisdiction over this appeal. The Court postponed consideration of this question to the hearing of the case on the merits. The argument against jurisdiction has two prongs: (1) that the government failed to take a timely appeal from the Court of Claims' order of January 27, 1978, and thus lost its right to seek review of the merits, retaining only a right to contest the computation of liability; and (2) that neither the January 27 order nor the final judgment of November 6 is an order "holding an Act of Con-

gress unconstitutional" (28 U.S. 1252). Appellees are wrong on both counts.

A. There Is No Need To Seek Immediate Review Of Interlocutory Decisions Concerning Liability

The notice of appeal was filed on December 5, 1978 (J.S. App. 8a), 29 days after the Court of Claims entered its final judgment in this case (J.S. App. 7a). The appeal accordingly is timely under 28 U.S.C. 2101(a).[11] Appellees contend however, that this appeal is untimely because the government did not appeal from the order of January 27, 1978, which decided the liability issue.

The January 27 order unquestionably is interlocutory. An order that decides matters of liability but reserves questions of relief *cannot* be appealed from a district court to a court of appeals. The strong policy against piecemeal appellate review requires the aggrieved party to wait until damages have been computed before filing his appeal. *Liberty Mutual Ins. Co.* v. *Wetzel*, 424 U.S. 737 (1976). The principles are much the same, we submit, when the appeal lies to this Court rather than to a court of appeals: liability issues can be addressed on appeal once relief has been entered.

It is true that 28 U.S.C. 1252, on which this appeal is based, allows review of both interlocutory and final orders declaring statutes unconstitutional. The

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[11] The appeal was docketed on April 4, 1979, within the extension of time granted by the Chief Justice. Appellees do not maintain that the docketing of the appeal was untimely.

provision for review of interlocutory orders reflects Congress' concern that the United States be able to obtain review at the earliest possible moment of orders striking down statutes. See *McLucas* v. *DeChamplain*, 421 U.S. 21, 31 (1975). But it does not follow, from the fact that the statute permits appeals of interlocutory orders, that it also requires immediate appeals on pain of forfeiture of all right to obtain review in this Court.[12] That would undermine the purpose of Section 1252: to permit full and effective review in this Court of decisions invalidating federal statutes. If the United States chooses to wait for a final judgment before filing an appeal—if it chooses, in other words, to act in the way that private litigants *must* act in ordinary civil litigation—that is not a good reason for holding that it has lost ability to obtain a decision on the merits.[13]

[12] Appellees misinterpret *McLucas* as construing Section 1252 "to authorize and require" immediate review of interlocutory orders (Motion to Affirm 11). Instead, in explaining why this Court's jurisdiction under Section 1252 is not subject to the limitations on direct appeals to this Court under 28 U.S.C. (1970 ed.) 1253, the Court emphasized the broad scope of review available under 1252 (421 U.S. at 31). See also R. Stern & E. Gressman, *Supreme Court Practice* § 2.10 (5th ed. 1978).

[13] The same is true for other statutes allowing interlocutory appeals. 28 U.S.C. 1292(a) allows apeals from interlocutory orders entering, dissolving, or modifying preliminary injunctions. Under appellees' argument, any person who failed to appeal from the entry of a preliminary injunction would be barred from challenging the entry of a permanent injunction that rested on the same legal grounds. But that has never been the law. See *Victor Talking Machine Co.* v. *George*, 105 F.2d 697 (3d Cir.), cert. denied, 308 U.S. 611 (1939) (collecting cases); cf. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. Co.*, 240 U.S. 251, 257-259 (1916) (decision of Court rests on grounds rejected by court of appeals in decision on interlocutory appeal, from which certiorari was denied). It would do nothing but produce useless legal work to require parties to appeal from preliminary injunctions when they are content to wait for a final order.

The rule that review of a final judgment entails review of any interlocutory decisions on liability also prevails under 28 U.S.C. 1255, which gives this Court certiorari jurisdiction over both interlocutory and final judgments of the Court of Claims. On petitions for certiorari filed after the final judgment determining damages, this Court is free to consider the validity of a previous order determining liability. *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709, 712 (1963);[14] *Marconi Wireless Co.* v. *United States*, 320 U.S. 1, 47 (1943). Cf. *American Foreign S.S. Co.* v. *Matise*, 423 U.S. 150 (1975) (jurisdiction based on 28 U.S.C. 1254); *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 418 (1923) (same); R. Stern & E. Gressman, *Supreme Court Practice* § 2.2 (5th ed. 1978) (collecting cases).[15]

[14] Although the Court in *Bianchi* considered the issues decided by the interlocutory order on the government's petition from the final order, it did not discuss its jurisdiction to do so. The jurisdiction issue was, however, specifically raised in that case. Respondents challenged the timeliness of the government's petition on grounds similar to those raised by appellees here; the government responded to those objections in its response to the brief in opposition (No. 529, October Term, 1962).

[15] The cases cited by appellees in support of their contention that this Court lacks jurisdiction because the govern-

B. The Court Of Claims Held An Act Of Congress Unconstitutional

28 U.S.C. 1252 authorizes an appeal from "an * * * order of [a] court of the United States * * * holding an Act of Congress unconstitutional in [a] civil action * * * to which the United States * * * is a party." The Court of Claims held an Act of Congress unconstitutional, and thus this Court has jurisdiction under 28 U.S.C. 1252. The Court of Claims recognized that Shawn and Tricia Clark do not meet the statutory requirements for benefits. It nevertheless required that benefits be paid, because, it held, the rule that prevented the payment is unconstitutional (J.S. App. 2a-3a). The court's conclusion that part of 5 U.S.C. 8341 is unconstitutional is the basis for its order directing payment of benefits. Section 1252 is "properly invoked when the court below has made [a] determination of unconstitutionality [that] * * * forms the necessary predicate to the grant or denial of * * * relief." *McLucas* v. *DeChamplain*, *supra*, 421 U.S. at 30; *United States* v. *Raines*, 362 U.S. 17, 20 (1960).

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ment did not appeal from the order determining liability (Motion to Affirm 11) apparently all involve failures to seek timely review of final orders. It is impossible to determine from the Court's per curiam opinions in *Glasgow Navigation Co.* v. *Munson S.S. Line*, 246 U.S. 647 (1918), and *Collard* v. *Pittsburgh, C. C. & St. L. Ry.*, 246 U.S. 653 (1918), in what way the Court's jurisdictional requirements had not been satisfied. Similarly, *Parish* v. *Maryland & Virginia Milk Producers Ass'n*, cert. denied, No. 78-1246 (Mar. 19, 1979), was simply an unexplained denial of certiorari.

Appellees argue, however, that *Gentry* v. *United States*, 546 F.2d 343 (Ct. Cl. 1976), reh'g denied, 551 F.2d 852 (1977), rather than the instant case, held the statute to be unconstitutional. But nothing in Section 1252 indicates that this Court's jurisdiction is affected by the fact that a lower court relies on an earlier decision in instructing the Executive Branch to disregard a statute.[16] Appellees' contention that an appeal under Section 1252 lies only from the *first* decision of any court holding a particular statute unconstitutional is inconsistent with the plain language of Section 1252, which permits an appeal from an order of any court, not just the first court or the first decision of a particular court. See *International Ladies' Garment Workers Union* v. *Donnelly Garment Co.*, 304 U.S. 243, 249 (1938). Appellees cite no precedent for their narrow reading of Section 1252, and we are aware of none.

II

THE COURT OF CLAIMS LACKED JURISDICTION OVER THIS CASE BECAUSE SOVEREIGN IMMMUNITY BARS ANY AWARD OF MONEY DAMAGES

The Court of Claims has jurisdiction of "any claim against the United States founded either upon the Constitution, or any Act of Congress * * *." 28

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[16] Similarly, this Court's jurisdiction would not be affected if the lower court said that the unconstitutionality of the statute was an inevitable consequence of a decision of this Court. Indeed, *jurisdiction* would be present even if the appeal concerned a statute that this Court explicitly had held unconstitutional in some earlier case.

U.S.C. 1491. "[T]he only judgments which the Court of Claims [is] authorized to render against the government * * * are judgments for money found due from the government to the petitioner." *United States* v. *King*, 395 U.S. 1, 3 (1969), quoting *United States* v. *Alire*, 73 U.S. (6 Wall.) 573, 575 (1867). Although the Court of Claims may "remand appropriate matters to any administrative * * * official with such direction as it may deem proper and just," its power to do so is limited to "any case within its jurisdiction" (28 U.S.C. 1491) and thus can be invoked only if the case is one in which an award of money is proper. *United States* v. *Testan*, 424 U.S. 392, 404 (1976).[17] Accordingly, unless the court had jurisdiction in this case to award a judgment for money, it had no jurisdiction to require the Commission to place Shawn and Tricia Clark on the annuity roles.

The Court of Claims had no jurisdiction for two reasons. First, there was no money due under the Civil Service Retirement statute. To the contrary, it was precisely because the statute does *not* allow the payment that the court declared it to be unconstitutional. Second, the Constitution itself neither requires nor authorizes an award of money damages as a remedy for any unconstitutionality there may be in the statute. To the contrary, the doctrine of

[17] The ancillary relief provision, added in 1972 (Pub. L. No. 92-415, Section 1, 86 Stat. 652), is not authority for ordering equitable relief incident to an improper award of money damages. See S. Rep. No. 92-1066, 92d Cong., 2d Sess. 1-3 (1972); H.R. Rep. No. 92-1023, 92d Cong., 2d Sess. 2-3 (1972).

sovereign immunity forbids the award of money in cases such as this and restricts a court to the award of prospective injunctive relief—precisely the kind of relief that the Court of Claims is not authorized to grant. Consequently, even if the lived-with rule of 5 U.S.C. 8341(a)(3) is unconstitutional, the Court of Claims was without jurisdiction.[18] It should have dismissed the suit or transferred it to a district court under 28 U.S.C. 1506.

The United States is immune from a judicial order to pay money as an accrued liability unless Congress has unequivocally authorized such relief. *United States* v. *Testan*, *supra*, 424 U.S. at 399; *United States* v. *King*, *supra*, 395 U.S. at 4. There is no such authorization here. By limiting the payment of annuities to illegitimate children who lived with the decedent, Congress expressly prohibited payment to children such as Shawn and Tricia Clark, who cannot satisfy that requirement. See *United States* v. *MacCollom*, 426 U.S. 317, 321-323 (1976). If a court

[18] Appellees assert (Motion to Affirm 16) that the government waived its right to question the Court of Claims' jurisdiction by failing to raise the question below. But, as this Court noted in *Philbrook* v. *Glodgett*, 421 U.S. 707, 721 (1975), "we have repeatedly held that we must take note of want of jurisdiction in the [court below] even though neither party has raised the point." Moreover, the Court of Claims' jurisdiction "depends wholly upon the extent to which the United States has waived its sovereign immunity to suit" (*United States* v. *King*, *supra*, 395 U.S. at 4), and that waiver can be made only by Congress, not by a failure to raise it in litigation. *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 513 (1940) (collecting cases); cf. *Nevada* v. *Hall*, No. 77-1337 (Mar. 5, 1979), slip op. 4-6.

holds the lived-with requirement unconstitutional, that removes the prohibition, but it does not create a *statutory* authorization for payments. Cf. *United States* v. *McDougall's Administrator*, 121 U.S. 89, 98 (1887). The authorization for such an award would have to be found in some statute other than the one that prohibited the payment.[19]

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[19] Appellees may argue that a statutory authorization is unnecessary because the relief granted to them here is part of the "prospective" application of the decision in *Gentry*. That argument would be unpersuasive for several reasons.

First, the application of *Gentry* to this case is not "prospective" so far as appellees are concerned. The Court of Claims did not enter a declaratory judgment or injunction in *Gentry*, and it had no authorization to do so. Appellees were not parties in *Gentry*. Appellees seek an award of money as an accrued liability. Although the holding on the merits in *Gentry* (if correct) would supply a good reason to grant appellees the relief they seek, it does not create statutory authority to do so.

Second, appellees do not challenge any decision of an agency that took place after *Gentry* was decided. The request for benefits was denied in 1974; *Gentry* did not become final until 1977. The denial of benefits thus did not violate any rights appellees may have acquired derivatively through the prospective application of *Gentry*. For this reason, an award of benefits as an accrued liability also cannot be justified as part of the enforcement of other judicial orders declaring the lived-with requirement unconstitutional. The injunction entered against the lived-with rule on November 30, 1977, in *Proctor* v. *United States*, 448 F. Supp. 418 (D.D.C.), does not apply to appellees because the case was not a class action. And the judgment in a class action declaring the requirement unconstitutional, *Jenkins* v. *United States Civil Service Comm'n*, 460 F. Supp. 611 (D.D.C. 1978), is on appeal. The petition in this case was filed in the Court of Claims 18 months before *Jenkins* was decided. Under the well-pleaded complaint rule, the jurisdiction of a court must be determined by the

The Tucker Act does not supply the necessary legislative authorization. As this Court explained in *Testan*, the Tucker Act "does not create any substantive right enforceable against the United States for money damages" (424 U.S. at 398). Finding a remedy in the Tucker Act would be especially inappropriate when the government has withheld benefits in accordance with a statute.[20]

The general provisions of the Civil Service Retirement Act also do not supply the necessary authority. That Act contains no provision stating that, if a

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allegations and theories of the complaint, not by subsequent events. *Costello* v. *Wainwright*, 430 U.S. 325 (1977); *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661 (1974).

[20] The Court of Claims concluded in *Gentry* that its jurisdiction was confirmed by *United States* v. *Lovett*, 328 U.S. 303 (1946), which affirmed a judgment of the Court of Claims awarding back pay to several federal employees despite an appropriation statute prohibiting payment of salaries to them. The court in *Gentry* concluded that there was an authorization to award money in *Lovett* and in *Gentry* because a court could "read the relevant statute and award whatever payment it grants, omitting from our interpretation of its effect any constitutionally void provision contained in it" (546 F.2d at 346). But in *Lovett* the employees had actually performed the work for which they sought payment—their claim of entitlement was based on that work and on the authorization statute allowing agencies to hire employees; it was not based on the appropriation statute. The appropriation statute was relevant only as a bar to payments to which the petitioners otherwise would have been entitled. Here, in contrast, appellees have no claim against the government that is not based on the challenged statute. Cf. *South Puerto Rico Sugar Co. Trading Corp.* v. *United States*, 334 F.2d 622, 626 (Ct. Cl. 1964).

portion of the statute forbidding payment is declared invalid, then the payments sought are authorized and retroactive payments are allowed. Instead, it provides only that "no benefit based on [the service of a deceased employee or Member] shall be paid * * * unless an application therefor is received in the Civil Service Commission within 30 years after the death or other event which gives rise to title to the benefit." 5 U.S.C. 8345(h)(2). It authorizes, in other words, the belated payment of benefits provided for by law. But it does not authorize the payment of money contrary to law.

This Court has stated repeatedly that waivers of sovereign immunity "cannot be implied but must be unequivocally expressed." *United States* v. *King*, *supra*, 395 U.S. at 4; *United States* v. *Testan*, *supra*, 424 U.S. at 399; *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941); *Soriano* v. *United States*, 352 U.S. 270, 276 (1957). In light of this general principle, the Civil Service Retirement Act should not be construed to authorize retroactive payments to persons to whom the statute explicitly denies benefits. Congress simply has not provided for retroactive payments where claimants cannot establish statutory eligibility for such payments. Cf. *Edelman* v. *Jordan*, 415 U.S. 651 (1974) (distinguishing between the award of an accrued monetary liability for past wrongs and prospective relief with monetary consequences); *Milliken* v. *Bradley*, 433 U.S. 267, 288-290 (1977) (same).

To be sure, this Court, without mentioning the sovereign immunity problem, has occasionally approved the payment of benefits as an accrued liability in the course of affirming decisions that had invalidated Social Security provisions on constitutional grounds. See, *e.g.*, *Califano* v. *Goldfarb*, 430 U.S. 199 (1977), aff'g 396 F. Supp. 308 (E.D.N.Y. 1975); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975), aff'g 367 F. Supp. 981 (D.N.J. 1973). But because the problem was not briefed, and the cases do not discuss it, they do not preclude the Court from now holding that retroactive relief is impermissible.[21] In recognizing the states' Eleventh Amendment immunity from retroactive monetary relief in *Edelman* v. *Jordan*, *supra*, the Court departed from four previous cases (including one decided after plenary consideration) that had approved such relief without explicitly considering the Eleventh Amendment problem (415 U.S. at 670-671).

The lack of jurisdiction in the Court of Claims does not mean that appellees have no remedy. They may seek an injunction in a district court to require OPM to put them on the annuity rolls. Congress has waived sovereign immunity in suits seeking injunc-

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[21] See also *Stone* v. *Powell*, 428 U.S. 465, 480-81 & nn.14, 15 (1976); *Hagans* v. *Lavine*, 415 U.S. 528, 533 n.5 (1974); *United States* v. *Tucker Truck Lines, Inc.*, 344 U.S. 33, 37-38 (1952); *Webster* v. *Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents").

tions. 5 U.S.C. 702. Indeed, appellees may already be members of the nationwide plaintiff class in *Jenkins* v. *United States Civil Service Comm'n*, 460 F. Supp. 611 (D.D.C. 1978), appeal pending, No. 79-1199 (D.C. Cir.), in which the district court held the lived-with requirement unconstitutional and ordered OPM to discontinue using it to deny annuities to class members. Although the government is appealing that decision, appellees may be entitled, as class members, to whatever equitable relief finally is ordered in *Jenkins*.

III

THE CONSTITUTION DOES NOT PROHIBIT CONGRESS' DECISION THAT ILLEGITIMATE CHILDREN MUST SHOW THAT THEY WERE LIVING WITH THE WAGE EARNER WHEN HE DIED IN ORDER TO QUALIFY FOR SURVIVORS' BENEFITS

If the Court disagrees with our submission that the Court of Claims lacked jurisdiction to pass on the constitutionality of the statute, then it will be required to consider the merits of this case.[22] We argue below that the lived-with requirement is constitutional because it bears an evident and substantial relationship to the goal of readily identifying the

[22] Several other federal courts, like the Court of Claims, have concluded that the lived-with requirement is unconstitutional. *Myers* v. *Commissioners of Civil Service Comm'n*, Civ. No. 8682 (S.D. Ohio Aug. 8, 1977); *Proctor* v. *United States*, 448 F. Supp. 418 (D.D.C. 1977); *Tenny* v. *United States*, 441 F. Supp. 224 (E.D. Mo. 1977); *Jenkins* v. *United States Civil Service Comm'n*, 460 F. Supp. 811 (D.D.C. 1978), appeal pending, No. 79-1199 (D.C. Cir.).

illegitimate children most likely to have been dependent on the wage-earner.

A. Classifications Based On Illegitimacy Are Not Subject To Strict Scrutiny

Several of this Court's recent decisions suggest that in evaluating statutory classifications based on illegitimacy, a somewhat closer scrutiny than that traditionally applied to laws regulating economic and social conditions may be appropriate. See, *e.g.*, *Trimble* v. *Gordon*, 430 U.S. 762, 767 (1977); *Parham* v. *Hughes*, No. 78-3 (Apr. 24, 1979) (plurality opinion). But see *Mathews* v. *Lucas*, 427 U.S. 495, 505 (1976).[23] This Court has nevertheless declined all invitations to subject such classifications to the

[23] The Court in *Lucas* refused to treat illegitimacy as a constitutionally suspect classification meriting the strict scrutiny applied to classifications based on race or national origin, stating (427 U.S. at 505) that "we have had no difficulty in finding the discrimination [against illegitimates] impermissible on less demanding standards than those advocated here." Although that language is consistent with the application of an intermediate test for classifications involving illegitimacy, the Court in *Mathews* v. *DeCastro*, 429 U.S. 181, 185 (1976)—a case involving a neutral classification—referred to *Lucas* as demonstrating "the standard by which legislation such as this must be judged" (429 U.S. at 185). This plurality opinion in *Lalli* v. *Lalli*, No. 77-1115 (Dec. 11, 1978), later cited *Lucas* as applying an intermediate standard to classifications involving illegitimacy (slip op. 5). Cf. *Parham* v. *Hughes*, *supra*, plurality slip op. 4-6. The cases thus continue to support Mr. Justice Rehnquist's observation in dissent in *Trimble*, *supra*, 430 U.S. at 781, that "the unanswered question remains as to the precise sort of scrutiny to which classifications based on illegitimacy will be subject."

"strict" scrutiny required when "suspect" classifications are involved. See, *e.g.*, *Mathews* v. *Lucas*, *supra*, 427 U.S. at 505; *Trimble* v. *Gordon*, *supra*, 430 U.S. at 766-767; *Lalli* v. *Lalli*, No. 77-1115 (Dec. 11, 1978), plurality slip op. 5. Classifications based on illegitimacy thus sometimes may be justified by the practical need of legislators to make classifications that deal with broad groups of persons and omit case-by-case decisionmaking. *Lalli* v. *Lalli*, *supra*, plurality slip op. 13. Cf. *Vance* v. *Bradley*, No. 77-1254 (Feb. 22, 1979), slip op. 14-15. As the Court explained in *Mathews* v. *Lucas*, *supra*, 427 U.S. at 509-510 (citations omitted):

> In cases of strictest scrutiny, such approximations must be supported at least by a showing that the Government's dollar "lost" to overincluded benefit recipients is returned by a dollar "saved" in administrative expense avoided. Under the standard of review appropriate here, however, the materiality of the relation between the statutory classifications and the likelihood of dependency they assertedly reflect need not be "scientifically substantiated." Nor, in any case, do we believe that Congress is required in this realm of less than strictest scrutiny to weigh the burdens of administrative inquiry solely in terms of dollars ultimately "spent," ignoring the relative amounts devoted to administrative rather than welfare uses. Finally, while the scrutiny by which their showing is to be judged is not a toothless one, the burden remains upon the [affected parties] to demonstrate the insubstantiality of that relation.

In sum, in cases involving statutory classifications based on illegitimacy, the Court "does not focus on the abstract 'fairness' of [the challenged] law, but on whether the statute's relation to the [governmental] interests it is intended to promote is so tenuous that it lacks the rationality contemplated by the [Fifth] Amendment." *Lalli* v. *Lalli*, *supra*, plurality slip op. 13. The question is simply whether the statutory provisions concerning illegitimate children "bear an evident and substantial relation to the particular [federal] interests this statute is designed to serve." *Id.* at 8. In light of *Lucas* and *Lalli*, the particular classification at issue here meets this test.

B. The Classification Is Substantially Related To Important Statutory Goals

1. *The Civil Service annuities for survivors are designed to replace support that may have been lost by the wage-earner's death*

The Civil Service Retirement Act, like the Social Security Act, is designed to replace support lost by the wage-earner's dependents when he dies.[24] The rule that benefits will be paid to the illegitimate children of a wage-earner only if they lived with him at his death furthers this statutory purpose by providing a ready method of identifying those illegitimate children most likely to have lost support.

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[24] See, *e.g.*, *Califano* v. *Boles*, No. 78-808 (June 27, 1979), slip op. 1, 7; *Jimenez* v. *Weinberger*, 417 U.S. 628, 634 (1974); *Mathews* v. *DeCastro*, 429 U.S. 181 (1976); *Califano* v. *Jobst*, 434 U.S. 47 (1977).

The surviving child's annuity was first enacted in 1948 (Act of February 28, 1948, ch. 84, Section 11, 62 Stat. 55). It was payable to "an unmarried child, including a dependent stepchild or an adopted child, under the age of eighteen years, or such unmarried child, who because of physical or mental disability is incapable of self-support." Children's benefits thus were paid only to those children most likely to have been dependent on the wage-earner because of their age or disability and their marital status. Moreover, the amount of the annuity depended on whether another parent survived, on the apparent theory that a surviving parent would provide supplementary support.[25]

Congress' attention to the problem of replacing lost support was evident in 1956, when it amended the survivorship provisions after *Visor* v. *United States*, Civ. No. 9922(2) (E.D. Mo. Feb. 12, 1955) interpreted the Act as providing benefits to illegitimate, as well as legitimate, children. The 1956 amendments elaborated on the earlier definition of an entitled child to include "(1) an adopted child and (2) a stepchild or recognized natural child who received more than one-half his support from and lived with the * * * employee in a regular parent-child relationship" 5 U.S.C. (1958 ed.) 2251(j). Instead of treating all illegitimate children as presumptively dependent on the employee, Congress required a specific showing of dependence for illegitimate children, as it previously had for stepchildren. In addition,

[25] 5 U.S.C. 8341(e). See note 1, *supra*.

legitimate children with a surviving parent were required, as a condition of entitlement, to show that they had received more than half their support from the deceased civil servant (5 U.S.C. (1958 ed.) 2260(d)). See also H.R. Rep. No. 2854, 84th Cong. 2d Sess. 17-18 (1956).

As it often has done when dealing with programs that replace lost support,[26] Congress eventually amended the statute to include more categorical rules, replacing case-by-case determinations of dependence with categories of eligibility that are likely (but not certain) to reflect dependence. The Civil Service Retirement Act was amended in this way in 1966. Pub. L. No. 89-554, 80 Stat. 577, 5 U.S.C. (1970 ed.) 8341(a)(3). The Court of Claims saw in this amendment a disavowal of the original principle that benefits are intended to replace lost support and the creation of a principle that all children are entitled to benefits. *Gentry* v. *United States*, *supra*, 546 F.2d at 343, 551 F.2d at 854-855. It was quite irrational, the court thought, to deny to illegitimates the advantages created by this new principle for the distribution of benefits. But the court erred in finding such a new approach in the 1966 revisions. Cf. *Califano* v. *Boles*, No. 78-808 (June 27, 1979), slip op. 7-12 (a similar reformation of another program did not amount to abandoning emphasis on replacing lost support).

[26] See, *e.g.*, *Califano* v. *Boles*, No. 78-808 (June 27, 1979), slip op. 9-12; *Califano* v. *Jobst*, *supra*, 434 U.S. at 57 n.16; *Mathews* v. *Lucas*, *supra*, 427 U.S. at 507-509.

The process of amendments began with a message from the President to Congress, transmitting the Joint Annual Report of the Director of the Bureau of the Budget and the Chairman of the Civil Service Commission and the Report of the Cabinet Committee on Federal Staff Retirement Systems H.R. Doc. No. 402, 89th Cong., 2d Sess. (1966); see *The Federal Salary and Fringe Benefits Act of 1966: Hearings on H.R. 14122 Before the Senate Comm. on Post Office and Civil Service*, 89th Cong., 2d Sess. 7 (1966). The Cabinet Committee report explains that the half-support requirement had the practical effect of denying benefits to the surviving children of most female civil servants, who typically earned less than their husbands, and thus contributed less than half of the support of their children. It therefore recommended a change, which later was enacted, precisely because "[r]etirement systems are intended to cushion the effects of loss of income through death * * *. [T]he preponderance of working wives * * * work because the family needs the money, especially for the children. * * * In short, the income of working mothers is significant for support of children, but is inadequate to meet the children's dependency requirement when the mother dies." H.R. Doc. No. 402, 89th Cong., 2d Sess. App. 41 (1966). The requirement of a case-by-case showing of dependence for illegitimate and step children was likewise eliminated, because, if such children were living with the deceased parent in a regular parent-child relationship, "the benefits should be paid

as for any other child" (*ibid.*).[27] Congress enacted the proposed changes without significant debate. The statute thus was, and remains, one of the class of statutes that provides "the wage earner and the dependent members of his family with protection against the hardship occasioned by his loss of earnings * * *." *Califano* v. *Jobst*, 434 U.S. 47, 52 (1977). It does this, as most similar statutes do, by directing benefits to the categories of persons that Congress thought are most likely to have lost support and need its replacement. The categorical lines are far from perfect; categorical lines always are. See *Califano* v. *Boles*, *supra*, slip op. 2-3, 7-12; *Califano* v. *Aznavorian*, No. 77-991 (Dec. 11, 1978), slip op. 5. But the imperfections here are not unconstitutional.

2. The lived-with requirement is a rational indicator of probable dependence

This Court held in *Mathews* v. *Lucas*, *supra*, 427 U.S. at 513-514, 516, that Congress, in dealing with illegitimates, constitutionally may "tailor[] statutory classifications in accord with its calculations of the likelihood of actual support suggested by a narrow set of objective and apparently reasonable indicators," even though the indicators may not be precisely ac-

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[27] The detailed explanation in the Cabinet Committee Report, *supra*, explains the cryptic comment in the Senate Report (S. Rep. No. 1187, 89th Cong., 2d Sess. 5 (1966)), on which the Court of Claims relied in *Gentry* (551 F.2d 854-855): "[T]he requirement that a child be dependent upon a Federal-employee parent in order to receive a survivor annuity [is eliminated to] * * * permit the children of a working mother to receive a survivor annuity in the event of her death."

curate. Accord, *Lalli* v. *Lalli*, *supra*, plurality slip op. 13-14. Moreover, the Court in *Lucas* evidently assumed that a showing that a wage-earner's illegitimate child lived with him was equivalent to a showing of that child's dependence on the wage-earner (427 U.S. at 498, 512-513). Although the Social Security Act under consideration in *Lucas* provided for other indicators of dependence,[28] the Court emphasized that "[t]o be sure, none of these statutory criteria compels the extension of a presumption of dependency. * * * [T]he constitutional question is not whether such a presumption is required, but whether it is permitted" (*id.* at 515). In the Civil Service Act Congress chose to rely on a single indicator of dependence—whether the illegitimate child lived with the wage earner. The two are sufficiently well related that the legislative choice is permissible.

The Court of Claims' contrary conclusion in *Gentry* apparently rested on its belief that *Lucas* turned on the fact that the Social Security provision at issue there permitted illegitimates to show dependence through a means other than living with the wage-earner. Where, as here, the method of qualifying for benefits is more restricted, the court thought, the method cannot be rationally related to the statutory purpose of replacing lost support. The court relied heavily on *Jimenez* v. *Weinberger*, 417 U.S. 628 (1974). It read that case as establishing that "barring a subclass of illegitimates from benefits, though

[28] Including a court order for child support—the indicator on which appellees chiefly rely.

some members may be dependents, conflicts with the overall aim of aiding dependents" (546 F.2d at 351-352). The Court of Claims thus read *Lucas* and *Jimenez* together as imposing a constitutional requirement that illegitimate children be given the opportunity to establish that they were in fact dependent on the deceased employee.[29]

This Court's subsequent decisions do not support *Gentry's* interpretation of those cases. In *Trimble* v. *Gordon*, *supra*, 430 U.S. at 770-771, the Court suggested that a statute might constitutionally distinguish between legitimate and illegitimate children by adopting "a middle ground between the extremes of complete exclusion and case-by-case determination" of the relevant characteristic (such as dependence). And in *Lalli* v. *Lalli*, *supra*, the Court upheld a statute that adopted such a middle ground (plurality slip op. 7). The Court explicitly recognized (*id.* at 12-13) that the use of categories necessarily will deny valued goods to some illegitimate children who,

[29] The statutory classifications involved in *Jimenez* defined the circumstances in which a disabled wage-earner's illegitimate children, born after the onset of his disability, were entitled to Social Security benefits. The Court concluded that those classifications could not constitutionally be used as indicators of dependence because they bore no rational relation to its likelihood. After-born illegitimates entitled to inherit under state law or legitimated by operation of state law were not more likely to have been dependent than after-born illegitimates who lived with the wage earner, but only the former could receive benefits. The assumption in the Civil Service Retirement Act that illegitimate children who lived with the wage-earner at the time of his death in normal parent-child relationships are the single group of illegitimate children *most* likely to have been dependent on him is not similarly irrational.

under a case-by-case approach, could establish their entitlement consistently with the broad statutory purposes. But such incidental inequitable results do not render a statute unconstitutional if the categories themselves are rational. *Califano* v. *Boles*, *supra*, slip op. 12-14; *New York Transit Authority* v. *Beazer*, No. 77-1427 (Mar. 21, 1979), slip op. 20-24; *Mathews* v. *DeCastro*, 429 U.S. 181, 189 (1976); *Califano* v. *Jobst*, *supra*, 434 U.S. at 53.[30]

3. *The statutory classification discourages spurious claims and facilitates efficient administration*

The role of the lived-with rule in establishing dependence is not the only source of support for the statute. This Court also has recognized that the difficulties of establishing the paternity of illegitimate children may justify statutory distinctions. See, *e.g.*, *Lalli* v. *Lalli*, *supra*, plurality slip op. 9; *Trimble* v. *Gordon*, *supra*, 430 U.S. at 770; *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 174 (1972). The lived-with rule assists in overcoming these difficulties in the administration of the Civil Service Retirement Act.

[30] The fact that legitimate children who did not live with the decedent receive benefits, even though they may not have been dependent, does not make the statute irrational because, as a group, legitimate children (even those who do not live with the wage-earner) are more likely to have been dependent on him than the class of illegitimate children who did not live with the wage-earner. Although the effect of the statutory classification is to award payments to some legitimate children who were not in fact dependent on the decedent, this type of overinclusiveness is very similar to that found constitutional in *Mathews* v. *Lucas*, *supra*.

The Act permits payments only to recognized illegitimate children. Unfortunately, however, evidence relating to the decedent's "recognition" of an illegitimate child frequently may be ambiguous. It also easily could be fabricated.[31] Evidence that the child was living with the wage-earner at his death is less likely to be ambiguous and is harder to fabricate. The children who were living with the wage-earner at the time of his death, like his legitimate children, almost always will be readily identifiable. "Recognized" illegitimate children may be harder to identify. Thus here, as in *Lalli* v. *Lalli*, the legislative classification serves to minimize expense, inconvenience, delay and uncertainty in the identification of the beneficiaries (plurality slip op. 11-12).

The statutory scheme of the Civil Service Retirement Act makes the prompt and certain identification of eligible annuitants particularly important. The lump sum death benefit is payable only if there are no survivors entitled to an annuity (5 U.S.C. 8342). Payment must be delayed if it is necessary to resolve uncertainties about the entitlements of illegitimate children. More significantly, if there are more than three entitled children on one account, the size of each child's annuity depends on the number of other children entitled on the same account.[32] Thus, subse-

[31] The problem is not eliminated by the dependence requirement imposed by the Court of Claims, because it would also be difficult to controvert a claim that the decedent made some contributions to the claimant's support.

[32] See note 1, *supra*.

quent identification of eligible annuitants may require the recoupment of payments previously made (see 5 U.S.C. 8346(b))[33] and often will result in the prospective reduction of payments that previously identified survivors have come to rely on. Uncertainty in the identification of eligible children may also delay the start of payments or cause possibly-disputed sums to be withheld.

The problem is exacerbated by the fact that an eligible child may apply for his benefit as long as 30 years after he first becomes entitled to it, and he will still receive benefits from the date of first entitlement (5 U.S.C. 8345(h)(2)). It is obviously important to the effective administration of the Act to minimize belated claims. A claim filed 30 years after a government employee's death, alleging that the claimant is the recognized illegitimate child of the employee, received support from him, and thus is entitled to an accrued annuity, could pose real administrative problems. Such a tardy claim not only would be difficult to evaluate but also often would require double payments, because it is unlikely that recoupment of payments made long ago to previously-identified survivors would be equitable (see 5 U.S.C. 8346(b)).

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[33] For example, in this case Isaacson's father was paid a lump sum death benefit of $7,755.12, which he has been required to refund (note 10, *supra*).

C. This Court Should Respect The Legislative Accommodation Of The Competing Interests

As the Court of Claims recognized (*Gentry* v. *United States*, *supra*, 546 F.2d at 351), the legislative goal of aiding dependent children would be served by awarding benefits to all illegitimate children who were dependent in fact on the wage-earner. The court thus thought that its invalidation of the lived-with rule was more faithful to the statute's "purpose" than was the statute itself. But statutes do not conflict with their own "purposes," and a court is not free to revise a statute because it thinks it can devise a plan better attuned to assumed legislative goals. It is often true that Congress seeks to achieve more than one goal through particular language. Cf. *United States* v. *Naftalin*, No. 78-561 (May 21, 1979), slip op. 6. Any attempt to achieve more of one of the goals may mean the achievement of less of another; it will upset the legislative accommodation of interests. See *Califano* v. *Boles*, *supra*, slip op. 2-4, 14-15. And so it is here.

The provision of assistance to all identifiable dependent children of deceased civil servants is not the only, or even the primary, goal of the Civil Service Retirement Act. The statute is designed to provide a comprehensive basic retirement and survivor's insurance plan for civil servants, at a cost reasonable for both the employee and employer. In determining the scope of the children's annuity program, Congress considered its relation to the entire package of benefits. Judgments concerning the particular classes of children to be included, the size of annuities payable,

and the costs of administering the program are necessarily related; improvement in one area requires a compensating sacrifice in another (*Califano* v. *Boles*, *supra*, slip op. 3, 14-15). The program devised by Congress reflects both its decision concerning the proper relationship among these considerations and its decision "to concentrate limited funds where the need is likely to be greatest" (*id.* at 15). The judicial attribution of an overriding goal to Congress, and the expansion of the class of entitled annuitants "better" to serve that goal, necessarily requires a reallocation of resources and thus distorts the insurance package Congress selected, whether by diminishing the protection afforded other annuitants, by increasing the cost of the insurance, or by adding to the difficulties of administration.

The balancing of the competing social interests is a matter within the particular competence of the legislature.[34] Here, as in *Mathews* v. *Lucas*, *supra*, 427 U.S. at 515-516 (citations omitted):

> These matters of practical judgment and empirical calculation are for Congress. * * * Our role is simply to determine whether Congress' assumptions are so inconsistent or insubstantial as not to be reasonably supportive of its conclusions * * *. In the end, the precise accuracy of Congress' calculations is not a matter of specialized judicial competence; and we have no basis to question their detail beyond the evident consistency and substantiality. We cannot say that these expectations are unfounded, or so indiscriminate as to render the statute's classifications baseless.

[34] Indeed, Congress is considering the desirability of expanding the class of children entitled to Civil Service survivor's annuities to include people situated similarly to Shawn and Tricia Clark. OPM has recommended legislation that would eliminate the lived-with requirement. S. 509, 96th Cong., 1st Sess. (1979); H.R. 2584, 96th Cong., 1st Sess. (1979). That legislation has not yet been acted on by the responsible committees.

CONCLUSION

The judgment of the Court of Claims should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1513

UNITED STATES OF AMERICA, *Appellant*

v.

PATRICIA ILENE CLARK, GUARDIAN FOR SHAWN D. CLARK AND TRICIA D. CLARK, MINOR CHILDREN, *Appellee*

On Appeal From the United States Court of Claims

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IN THE
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UNITED STATES OF AMERICA, APPELLANT

v.

PATRICIA ILENE CLARK, GUARDIAN FOR SHAWN D. CLARK AND TRICIA D. CLARK, MINOR CHILDREN, APPELLEE

ON APPEAL FROM
THE UNITED STATES COURT OF CLAIMS

APPELLEE'S BRIEF

This brief is submitted on behalf of appellee Patricia Ilene Clark, guardian for Shawn D. Clark and Tricia D. Clark, in opposition to the Government's appeal on the merits and in support of appellee's continuing motion to dismiss said appeal on the grounds (a) it is not within this Court's jurisdiction under 28 U.S.C. 1252 and (b) the appeal fails to present a substantial

federal question for review.

OPINIONS BELOW

The summary judgment rendered by the Court of Claims on January 27, 1978 is not officially reported, but is printed in the Appendix, at pages 25-27. The Government's stipulation for entry of a money judgment in favor of appellee and her minor wards is printed in the Appendix, at pages 28, 29, and the money judgment thereafter entered by the Court of Claims on November 6, 1978 pursuant to said stipulation is printed in the Appendix at pages 30, 31.

JURISDICTION

The Government's jurisdictional claim is predicated exclusively on 28 U.S.C. 1252 and on May 21, 1979, this Court postponed further consideration of the question of jurisdiction to the hearing of this case on the merits. Appellee thus continues to contend this Court does not have jurisdiction over this case under 28 U.S.C. 1252 for three (3)

reasons as follows:

1. The Government did not appeal from the Court of Claims' summary judgment of January 27, 1978 (App., pgs. 25-27) under 28 U.S.C. 1252 "within thirty days after the entry of [that] interlocutory or final order, judgment or decree" in the manner prescribed by 28 U.S.C. 2101(a) – and no extension of that appeal time was sought from or granted by this Court or any Justice thereof.

2. The summary judgment granted by the Court of Claims on January 27, 1978 (App., pgs. 25-27) does not invalidate or hold unconstitutional any Act of Congress. Rather, pursuant to the Government's concession that the Court of Claims' prior rulings in Gentry v. United States, 212 Ct. Cl. 1, 546 F.2d 343 (1976) – from which the Government took no appeal – are "dispositive of the case now before us" [1/] – the court below summarily granted judgment in favor of the two minor

1/ Appendix, pg. 26.

children in this case for survivors' benefits under 5 U.S.C. 8341(e), the Civil Service Retirement Act. 2/

3. The subsequent money judgment entered by the Court of Claims on November 6, 1978 pursuant to the Government's stipulation, 3/ likewise does not invalidate or hold unconstitutional any Act of Congress, as required by 28 U.S.C. 1252. Rather, said order merely grants a regular money judgment in favor of the aforementioned minor children based on the Government's stipulation for entry of judgment.

QUESTIONS PRESENTED

This case accordingly presents the following questions for review:

1. Does this Court have jurisdiction over this particular case under 28 U.S.C. 1252 in view of (a) the Government's complete failure to file any appeal from the Court of Claims' 1976 rulings in Gentry v. United States,

2/ Appendix, pgs. 26, 27.
3/ Appendix, pgs. 28, 29.

supra, (b) the Government's similar failure to file a timely appeal with reference to the Court of Claims' summary judgment of January 27, 1978 in this case, and (c) the fact that neither the Court of Claims' summary judgment of January 27, 1978 nor its subsequent stipulated money judgment of November 6, 1978 actually, in and of themselves, invalidate or hold unconstitutional any Act of Congress?

2. Did the Court of Claims have jurisdiction under the Tucker Act (28 U.S.C. 1491) to render a money judgment in this case based strictly on a money claim for statutory survivors' benefits under the Civil Service Retirement Act, as amended (5 U.S.C. §§8331-48 (1970)), and to order, pursuant to 28 U.S.C. 1491, that the minor children be placed on the annuity rolls for future annuity payments?

3. Should this Court ignore the specious constitutional questions belatedly

raised by the Government and simply affirm the Court of Claims' summary judgment on the ground that the minor children involved in this case are entitled to their survivors' annuity under 5 U.S.C. 8341, properly and fairly construed? If the Court agrees with this premise, then must not the Government's appeal be dismissed for failure to present a constitutional question for review?

4. Assuming this Court reaches the merits of the Government's constitutional arguments in this case, the following additional questions are then presented:

(i) Is it constitutionally permissible under the Fifth Amendment for the Civil Service Retirement Act to be applied by the Government in such manner that it discriminates against lawful, recognized natural children of deceased federal civil service employees by denying them their statutory survivors' annuity solely because they did not continuously live with their deceased

father up to the date of his death while (a) other lawful natural children of such employees receive their annuities without any such requirement and (b) even adopted children, children for whom an adoption petition has been filed and stepchildren receive annuities merely because they actually resided with their deceased fathers at the time of death?

(ii) Should the Government be allowed at this late date suddenly to revive and reinstate that old insidious, discriminatory application of the Civil Service Retirement Act in this case in the face of (1) an unbroken, unanimous line of federal decisions which have repeatedly declared that requirement unconstitutional, without any effort on the part of the Government to appeal to this Court and (b) recent statutory proposals by the Government itself for permanent removal of that requirement insofar as future annuity claims by children of federal employees are concerned?

STATUTORY PROVISIONS INVOLVED

All pertinent statutory provisions are set forth in the Government's brief at pages 2-5. The Government's pending statutory proposals for elimination of the "lived-with" requirement of 5 U.S.C. 8341 (a)(3)(A) are set forth in the Appendix to this brief, together with its testimony in support thereof.

COUNTER-STATEMENT OF THE CASE

Prior to his death on August 17, 1974, George G. Isaacson was a federal civil service employee employed at the Veterans Administration Center in Fort Harrison, Montana (A.12). 4/ Shawn Douglas Clark and Tricia Deanne Clark, his children and both of whom are minors, were born in 1968 and 1971, respectively (A.12). At the time of their births, their father, Mr. Isaacson, and their mother, Patricia Ilene Clark, appellee herein, were not formally married. However, during the period from in or

4/ References to the printed Appendix are indicated by "A." and the page number.

about 1965 through at least 1971, Mr. Isaacson and Ms. Clark openly lived together in the same domicile as husband and wife, and after Shawn and Tricia were born, they continued to live together with them as their mother and father (A.7).

Subsequently, Ms. Clark filed suit against Mr. Isaacson in a court of competent jurisdiction in Montana to establish his paternal relationship to Shawn and Tricia, and to obtain a judicial decree ordering him to support the two children (Clark v. Isaacson, No. 5625, District Court, First. Jud. Dist., Broadwater County, Montana, App. A to this brief). Mr. Isaacson personally appeared in that action, and he was represented by counsel. After a trial which lasted three (3) days, and after receiving a written stipulation of proposed support from Mr. Isaacson, the Montana court issued the following Judgment on June 2, 1972, more than two (2) years before Mr. Isaacson's accidental death in

1974 (App. A hereto):

"Upon the foregoing Findings of Fact And Conclusions Of Law, It Is Hereby Ordered, Adjudged and Decreed As Follows:

"(1) That the Defendant, George Gerald Isaacson, is the father of Shawn Douglas Clark, who was born in St. John's Hospital, Helena, Montana, on April 13, 1968, and of Tricia Deanne Clark, who was born at St. Peter's Hospital in Helena, Montana, on January 28, 1971.

"(2) That Defendant pay to the Plaintiff on or before the 1st day of June, 1972, the sum of Five Thousand and no/100 Dollars ($5,000.00) as full and final settlement of all past obligations between the parties of every kind and nature whatsoever.

"(3) That Defendant pay to the Plaintiff, through the Clerk of the above-entitled Court, the sum of Sixty and no/100 Dollars ($60.00) per month for each of the said children (Ten and no/100 Dollars of which shall represent medical insurance costs for each child); said payments shall commence on the 1st day of June, 1972, and shall be paid on the 1st day of each month thereafter until such time as each of the said children shall reach their age of majority.

"(4) That Defendant change the beneficiaries under the following policies to make Shawn Douglas Clark and Tricia Deanne Clark first beneficiaries, to wit:

"(a) New York Life Insurance Policy in the amount of Ten Thousand and no/100 Dollars ($10,000.00).

"(b) Federal Employees Group Life Insurance Policy in the amount of Fifteen Thousand and no/100 Dollars ($15,000.00) . . . ."

Accordingly, up to the time of his death in August, 1974, Mr. Isaacson regularly complied with the Montana decree and provided monthly support payments to his lawful children, Shawn and Tricia. Indeed, also pursuant to said decree, they were his named life insurance beneficiaries at the time of his death in 1974.

Shortly after Mr. Isaacson's death, therefore, an appropriate application was filed with the Civil Service Commission on behalf of Shawn and Tricia requesting payment of the Survivors' Annuity prescribed by 5 U.S.C. 8341 for children of civil service employees who die without a surviving spouse (5 U.S.C. 8341(e)(1)). Under 5 U.S.C. 8341(a)(3)(A), such annuities are payable to "any unmarried child under 18 years

of age," including –

"(i) an adopted child, and

"(11) a stepchild or recognized natural child who lived with the employee . . . in a regular parent-child relationship." [Emphasis supplied.]

On September 27, 1974, however, the Commission's Bureau of Retirement Insurance and Occupational Health denied appellee's application on the ground that Shawn and Tricia allegedly "did not live with the decedent in a regular parent-child relationship" (A.4). The Bureau thus directed that said annuity be paid to Mr. Isaacson's surviving father in one lump sum payment, but he promptly offered to return the money if the Commission would recognize the statutory annuity rights of his deceased son's children, Shawn and Tricia (A.6).

An appeal was thus filed on behalf of Shawn and Tricia with the Commission's Board of Appeals and Review. A series of affidavits were submitted which established that (1) Mr. Isaacson and Ms. Clark openly lived together as man and

wife in the same domicile commencing in 1965, and (2) after Shawn and Tricia were born, the family continued openly to live together in the same dwelling through 1971 (A. 6, 7). In addition, a copy of the Montana court decree was filed in evidence, and the Board was apprised of the willingness of Mr. Isaacson's father to refund the lump sum annuity paid to him as aforesaid (A. 6). Nevertheless, the Board of Appeals affirmed the Bureau's earlier action stating (A. 7-9):

> "The certificate of death for George Gerald Isaacson indicates that his date of death was August 17, 1974. The affidavits giving detailed information concerning his alleged parent-child relationship with the Clark children all stated that the alleged relationship existed from either 1965 or 1966 until 1971. Indeed, the formal decree of the Montana court, in which decedent was ordered to support the Clark children, is dated June 2, 1972. Under the circumstances, the Board must conclude that the decedent did not live in a parent-child relationship with the Clark children from at least 1972 until the date of his death in 1974. The Board therefore concurs with the BRIOH decision that a regular parent-child relationship did not exist between the deceased and Shawn and Tricia Clark . . ..

"The Board notes appellants' argument that 5 U.S.C. 8341 is unconstitutional. However, until this provision of the retirement law is held unconstitutional by a court of competent jurisdiction, the Commission has no alternative but to continue its enforcement."

On July 9, 1976, therefore, appellee commenced the instant action in the United States Court of Claims demanding payment of the survivors' annuity lawfully owed to Shawn and Tricia under 5 U.S.C. 8341 — and after the Government filed its answer, she moved for summary judgment.

On November 17, 1976, the Court of Claims rendered its judgment in another case, Gentry v. v. United States, 212 Ct. Cl. 1, 546 F.2d 343 (1976), rehearing denied, 212 Ct. Cl. 27, 551 F.2d 852 (1977). In that case, the Court of Claims ruled (a) it had full statutory jurisdiction under the Tucker Act (28 U.S.C. 1491) over claims for statutory survivor benefits unlawfully withheld by the Government under the Civil Service Retirement Act (5 U.S.C. 8341), and (b) that the "lived with" requirement of

5 U.S.C. 8341(a)(3)(A) is "severable from the legislative scheme of that statute, when read in light of the Fifth Amendment" because (1) it conflicts with the overall aim of the statute, which is to aid dependents of federal employees; (2) it does not promote any goal of preventing spurious claims; and (3) it cannot be sustained as a recognizable aid to administrative convenience.

The Government failed to file any appeal to this Court from the Court of Claims' judgment in Gentry, supra. Indeed, in its jurisdictional statement in this case, the Government states that "[s]everal other lower federal courts have declared the lived with requirement [of 5 U.S.C. 8341] unconstitutional," and that none of those decisions have been disturbed by this Court, albeit the issue has been here before. 5/

5/ Government's jurisdictional statement, pg. 7, ftnt. 5.

Thus, in this case, after the decision in Gentry, the Government notified the Court of Claims that, in its view, "Gentry, supra, is dispositive of the case now before us" (A. 26). Hence, without discussing any of the jurisdictional or constitutional issues settled by Gentry, without appeal to this Court, the Court of Claims, on January 27, 1978, granted appellee's motion for summary judgment in this case, stating (A. 27):

> "In summary, on the uncontested facts of parentage, recognition and support, plaintiffs have shown that they have a right to recover the benefits provided by 5 U.S.C. §8341. Because the court has previously held a portion of 5 U.S.C. §8341 to be unconstitutional insofar as it discriminates between legitimate and illegitimate children solely on the basis of their status at birth, and since there are no factual issues which require CSC determination, we hold that plaintiffs are entitled to recover the annuity provided by the statute."

As indicated above, the Government filed no appeal from this judgment under 28 U.S.C. 1252 within the 30-day period prescribed by 28 U.S.C. 2101(a) — and ultimately, after

further unconscionable procrastination, the Government agreed to stipulate for the entry of a money judgment in favor of Shawn and Tricia (A. 28,29). That judgment issued on November 6, 1978. Then, and only then, did the Government file a Notice of Appeal on December 5, 1978.

Still, it delayed the filing of its jurisdictional statement until April 4, 1979 — so that for more than five (5) full years, it has successfully deprived the two (2) minor children involved in this case of the unqualified right to their lawful statutory annuity. 6/ Now, five (5) years after this case began, the Government advises this Court in its jurisdictional statement that, while it continues relentlessly and capriciously to press its malin-

6/ Pursuant to the Court of Claims' judgment of November 6, 1978, the Government placed Shawn and Tricia on the annuity rolls effective June 30, 1978, and thus they have been receiving an annuity of $187 per month each since June 30, 1978. They have not yet received, of course, their annuities back to their father's date of death in August, 1974.

gering, baseless defense against Shawn and Tricia's annuity claim under 5 U.S.C. 8341 7/ -

> "OPM [successor to the Civil Service Commission] has recommended legislation to the current Congress that it eliminate the lived with requirement [from 5 U.S.C. 8341] . . . ."

SUMMARY OF ARGUMENT

I

Neither the Court of Claims' summary judgment of January 27, 1978 nor the stipulated money judgment of November 6, 1978 held any "Act of Congress unconstitutional." Thus, this Court has no basis for extraordinary mandatory jurisdiction under 28 U.S.C. 1252 in this case.

Assuming arguendo, the Court of Claims' summary judgment of January 27, 1978 can be construed to raise a valid constitutional issue for review, this Court still has no jurisdiction under 28 U.S.C.

7/ Government's jurisdictional statement, pg. 10, ftnt. 8. See H.R. 2584, 96th Cong., 1st Sess. (1979), found in Appendix B to this brief.

1252 because the Government failed to appeal from that judgment within thirty (30) days as required by 28 U.S.C. 2101 (a).

28 U.S.C. 1252 allows appeals from both interlocutory and final judgments, and in McLucas v. DeChamplain, 421 U.S. 21, 31, this Court ruled the statutory purpose of 28 U.S.C. 1252 was "to afford immediate review . . . in civil actions to which the United States or its officers are parties and thus will be bound by a holding of unconstitutionality." Here, the Government felt no need for "immediate review," and thus it waited more than ten (10) months to appeal, after having failed to appeal from four prior judgments in other cases which found the statute here involved unconstitutional.

Under such circumstances, the Government's remedy is the more leisurely certiorari process, not a direct appeal

under 28 U.S.C. 1252.

II

The Court of Claims plainly had jurisdiction over the money claim for a survivors' annuity in this case (United States v. King, 395 U.S. 1; United States v. Testan, 424 U.S. 392); and under 28 U.S.C. 1491, it has the power to supplement its money judgment against the United States with a directive to the Civil Service Commission that the minor children be added to the annuity rolls for future payments as they became due.

Moreover, this Court has repeatedly recognized the power of federal courts to enter money judgments for survivors' benefits in cases where discriminatory provisions of the federal statute providing such benefits are rejected on constitutional grounds (Weinberger v. Weisenfeld, 420 U.S. 636, affg. 367 F.Supp. 981; Califano v. Goldfarb, 430 U.S. 199, affg. 396

F.Supp. 308). Indeed, all the jurisdictional arguments raised by the Government in this case were rejected by the Court of Claims in Gentry v. United States, 546 F.2d 343 (1976), and the Government failed to appeal or seek certiorari.

Finally, the Government failed here to raise any issue regarding the Court of Claims' jurisdiction in that court, and it actually stipulated in writing for the entry of both the money judgment and the supplemental directive that Shawn and Tricia be placed on the annuity rolls for future payments.

III

It is clearly unnecessary for this Court to reach the constitutional issues raised by the Government's appeal because, under the facts of this case, Shawn and Tricia meet all the statutory requirements for a survivors' annuity under 5 U.S.C. 8341(a)(3)(A), fairly and properly construed.

In this regard, the Court of Claims entered judgment in their favor because, on the uncontested facts, they meet all the parentage, recognition and support requirements for recovery under 5 U.S.C. 8341(a)(3)(A). The Government challenges that ruling solely because it contends the "lived with" provision of 5 U.S.C. 8341(a)(3)(A) required Shawn and Tricia physically to live with their deceased father under the same roof on the date of his death, whereas they physically lived with him only thorugh 1971 (A.7).

Fairly construed, however, 5 U.S.C. 8341(a)(3)(A) does not require Shawn and Tricia to show they physically lived with their father under the same roof on the date of his death. Rather, it requires merely a showing that they "lived with the employee . . . in a regular parent-child relationship" at some time prior to his death. Shawn and Tricia made such show-

ing, and buttressed it with proof that, in 1972, during the employee's lifetime, a Montana court of competent jurisdiction adjudged him their father and ordered him to support them, which he thereafter did to the date of his death.

Consequently, this Court should affirm the Court of Claims' summary judgment under 5 U.S.C. 8341(a)(3)(A) without reviewing the constitutional questions presented by the Government. In such event, the Court of Claims clearly had jurisdiction to render a money judgment based on the statute thus construed, and the Government's direct appeal must be dismissed under 28 U.S.C. 1252 for failure to raise a reviewable constitutional issue.

IV

If the Court finds it necessary to reach the constitutional issues so belatedly raised by the Government in this Court after it stipulated to judgment in the

Court of Claims, then it is clear, under the facts of this case, that the Fifth Amendment prohibits the Government from discriminatorily and arbitrarily applying the "lived with" provision of 5 U.S.C. 8341(a)(3)(A) in such a distorted, unreasonable manner as to deprive Shawn and Tricia of their statutory indemnity (Jimenez v. Weinberger, 417 U.S. 628; Trimble v. Gordon, 430 U.S. 762, Lalli v. Lalli, ____ U.S. ____, 99 S.Ct. 518; Gentry v. United States, supra, Myers v. Hampton, No. 8682 (S.D. Ohio, 1977); Tenny v. United States, 441 F.Supp. 224; Proctor v. United States, 448 F.Supp. 418; Jenkins v. United States, 460 F.Supp. 611, app. pend.).

In the case at bar, Shawn and Tricia not only "lived with" their deceased father in a regular parent-child relationship prior to 1972, but in 1972, during the father's lifetime, he was adjudged their

father and ordered to support them by a Montana court of competent jurisdiction — and he thereafter supported them to the date of his death.

The basic purpose of the Civil Service Retirement Act is to guarantee a survivors' annuity to all unmarried children of deceased federal employees under 18 years of age — even adopted children, stepchildren and children for whom a petition of adoption is pending when the employee dies. That statutory purpose is clearly defeated by any arbitrary, tortured application of the "lived with" provision which precludes lawful natural children such as Shawn and Tricia from their statutory annuity after a court of competent jurisdiction established both their father's paternity and obligation to support them while he was alive and a full participant before the court in Montana.

V

Finally, the "lived with" requirement, as arbitrarily applied by the Government in this case, cannot be sustained as necessary to prevent spurious claims or to facilitate administration of the Civil Service Retirement Act in the face of (A) the Government's failure to appeal from at least four (4) other prior federal decisions which either nullified or enjoined the enforcement of that provision and (B) the Government's current legislative drive permanently to repeal that requirement. As stated by the Government in a carefully secluded footnote in its brief:

> "OPM has recommended legislation that would eliminate the lived with requirement."

ARGUMENT

I

THIS COURT DOES NOT HAVE JURISDICTION OVER THIS CASE UNDER 28 U.S.C. 1252

On May 2, 1979, appellee moved to dismiss the Government's appeal because it is not within this Court's jurisdiction under 28 U.S.C. 1252. On May 21, the Court postponed further consideration of that question so that issue must be settled at this time.

Essentially, appellee's motion to dismiss for lack of jurisdiction is based on two (2) grounds:

1. Neither the Court of Claims' summary judgment of January 27, 1978 nor the stipulated money judgment of November 6, 1978 held any "Act of Congress unconstitutional." Thus, this Court has no basis for extraordinary mandatory jurisdiction under 28 U.S.C. 1252 in this case.

2. Assuming arguendo, as the Government contends, that the Court of Claims'

summary judgment of January 27, 1978 may be tortured into a "holding of unconstitutionality" merely because the court accepted the Government's concession that a 1976 ruling in Gentry v. United States, supra, was "dispositive of the case now before us" (A. 26), then this Court still has no jurisdiction under 28 U.S.C. 1252 at this late date because the Government failed to appeal from that alleged January 27, 1978 "holding of unconstitutionality" within thirty (30) days, as required by 28 U.S.C. 2101(a).

28 U.S.C. 1252, of course, provides that an appeal may be taken from either "an interlocutory or final judgment, decree or order . . . holding an Act of Congress unconstitutional in any civil action . . . to which the United States . . . is a party." 28 U.S.C. 2101(a), in turn, prescribes that the appeal to this Court under 28 U.S.C. 1252 "shall be taken within thirty

days after the entry of the interlocutory or final order, judgment or decree."

In McLucas v. DeChamplain, 421 U.S. 21 31, 95 S.Ct. 1365, 1371, 43 L.Ed. 2d 699 (1975), this Court construed 28 U.S.C. 1252 to authorize and require "immediate review in this Court," irrespective of the form (interlocutory or final) of lower court orders which clearly invalidate Acts of Congress. Mr. Justice Powell, writing for the Court, stated:

> "The language of the statute sufficiently demonstrates its purpose: to afford immediate review in this Court in civil actions to which the United States or its officers are parties and thus will be bound by a holding of unconstitutionality. The purpose of §1252 is too plain to allow circumvention . . . ." [Emphasis supplied.]

Appellee strenuously contends that neither the Court of Claims' summary judgment of January 27, 1978 nor the Court of Claims' subsequent stipulated money judgment of November 6, 1978 in this case held

an Act of Congress unconstitutional. Rather, the statute involved in this case was ruled unconstitutional by at least four (4) courts prior to 1978 (Gentry v. United States, 546 F.2d 343 (Ct. Cl. 1976), rehearing denied, 551 F.2d 852 (1977); Myers v. Hampton, S.D. Ohio, 1977, No. 8682; Tenny v. United States, 441 F. Supp. 224 (E.D. Mo. 1977); and Proctor v. United States, 448 F. Supp. 418, (D.C.D.C. 1977)) - and thus, in this case, the Government merely conceded that these prior holdings were "dispositive of the case now before us," so summary judgment was granted in favor of appellee without any need to hold "any Act of Congress unconstitutional" (A. 26, 27).

In other words, the Government, already bound by a series of four (4) prior holdings of unconstitutionality which had become final and from which it did not appeal to this Court under 28 U.S.C. 1252 - simply conceded the issue in this case,

so the Court of Claims entered summary judgment for Shawn and Tricia Clark without in any respect reconsidering or ruling on the matter of 5 U.S.C. 8341's constitutionality (A. 25-27). The basis of the decision below was not that the Act of Congress was unconstitutional (United States v. Raines, 362 U.S. 17, 20, 80 S.Ct. 519, 522, 4 L. Ed.2d 524 (1960)). Rather the basis of the decision below was the Government's flat concession that Shawn and Tricia were entitled to summary judgment as a matter of law. 8/ Thus, the Court of Claims merely

8/ A narrow construction of 28 U.S.C. 1252 justly to dispose of this case on jurisdictional grounds is "consonant with the overriding policy, historically encouraged by Congress, of minimizing the mandatory docket of this Court in the interests of sound judicial administration" (Gonzalez v. Automatic Credit Union, 419 U.S. 90, 98, 95 S.Ct. 289, 294, 42 L.Ed.2d 249 (1974)). Also, this Court has regularly construed 28 U.S.C. 1253 narrowly to allow mandatory direct appeals only from orders "actually entered by three-judge courts" (Gonzalez, supra; Idlewild Bon Voyage Liq. Corp. v. Epstein, 370 U.S. 713, 82 S.Ct. 1294, 8 L.Ed.2d 794 (1962); Hicks v. Pleasure House, Inc., 404 U.S. 1, 92 S.Ct. 5, 30 L.Ed.2d 1 (1971)).

held (A.27):

> "In summary, on the uncontested facts of parentage, recognition and support, plaintiffs have shown that they have a right to recover the benefits provided by 5 U.S.C. §8341(e)."

But, even assuming arguendo, as the Government contends, that somehow the Court of Claims' judgment of January 27, 1978 can be twisted into a "holding of unconstitutionality," this Court still has no jurisdiction under 28 U.S.C. 1252 because the Government failed to appeal from that summary judgment for more than ten (10) months — whereas 28 U.S.C. 2101(a) requires such appeals to be taken within thirty (30) days whether that order be construed "interlocutory" or "final" (Whitsitt v. Union Depot & R.R. Co., 122 U.S. 363, 7 S.Ct. 1248, 30 L.Ed. 1150 (1887); Glasgow Navigation Co., Ltd. v. Munson Steamship Line, 246 U.S. 647, 38 S.Ct. 315, 62 L.Ed. 919 (1918); Collard v. Pittsburgh C.C. & St. L.Ry.Co.,

246 U.S. 653, 38 S.Ct. 336, 62 L.Ed. 922 (1918); Citizens Bank of Michigan City v. Opperman, 249 U.S. 448, 39 S.Ct. 330, 63 L.Ed. 701 (1919); Rust Land & Lbr. Co. v. Jackson, 250 U.S. 71, 76, 39 S.Ct. 424, 63 L.Ed. 850 (1919); Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 417, 418, 43 S.Ct. 458, 67 L.Ed. 719 (1923); Hartford Accident & Indemnity Co. v. Bunn, 285 U.S. 169, 175, 176, 52 S.Ct. 456, 76 L.Ed. 1301; Matton Steamboat Company v. Murphy, 319 U.S. 412, 415, 63 S.Ct. 1126 (1943); Cole v. Violette, 319 U.S. 581, 63 S.Ct. 1204 (1943); Parish v. Maryland and Virginia Milk Producers Association, Inc., ____ U.S. ____, 99 S.Ct. 1507 (1979)).

The Government argues in its brief that "there is no need to seek immediate review" under 28 U.S.C. 1252; that when federal statutes are ruled unconstitutional by valid lower court judgments, mandatory direct appeals to this Court can be

delayed until money damages are computed by stipulation of the parties, even if that consumes months or years. But, that argument is contrary to both the plain intent and purpose of 28 U.S.C. 1252 itself and this Court's recent decision in McLucas v. DeChamplain, supra, where it was held:

> "The language of the statute sufficiently demonstrates its purpose: to afford immediate review in this Court in civil actions to which the United States or its officers are parties and thus will be bound by a holding of unconstitutionality . . .."

If an Act of Congress is ruled unconstitutional, the Government has the duty and right under 28 U.S.C. 1252 to seek "immediate review," whether the ruling of unconstitutionality be deemed "interlocutory" or "final." The Government cannot sit idly by for years -- while one federal court after another rules a statute unconstitutional -- and then sit by for months when allegedly a fifth or sixth federal court

follows suit without seeking its right to "immediate review." This is outlawed by 28 U.S.C. 2101(a), which requires such direct appeals to be filed within thirty (30) days. If the Government can afford the type of delays it describes in its brief, then a mandatory direct appeal to this Court is clearly unnecessary, and the Government should be remitted to its right to proceed by certiorari.

II

THE COURT OF CLAIMS PLAINLY HAD JURISDICTION OVER APPELLEE'S MONEY CLAIM FOR SURVIVORS' ANNUITY UNDER THE CIVIL SERVICE RETIREMENT ACT. INDEED, THE GOVERNMENT STIPULATED IN WRITING THAT THE COURT OF CLAIMS COULD ENTER BOTH A MONEY JUDGMENT FOR PAST ANNUITIES DUE, AND THAT SHAWN AND TRICIA SHOULD BE PLACED ON THE ANNUITY ROLLS FOR FUTURE ANNUITY PAYMENTS

The Government, which stipulated in writing in this case that the Court of Claims should (a) enter a money judgment in favor of Shawn and Tricia for past annuities due under the Civil Service Retirement Act, and (b) issue an order that they be placed on the "annuity rolls for continued payments of children's survivor

annuity pursuant to 5 U.S.C. §8341(e) from June 30, 1978 until their eligibility expires" (A. 28, 29), now outrageously asks this Court to nullify the actions the Court of Claims took pursuant to that stipulation (A. 30, 31) because allegedly (1) "there was no money due under the Civil Service Retirement statute" and (2) "the Constitution itself neither requires nor authorizes an award of money damages as a remedy for any unconstitutionality there may be in the statute. 9/

The President of the United States recently stated in a nationwide telecast that the people are sadly losing faith and confidence in their Government. That is hardly surprising when the Government behaves in the fashion described above in a case involving two minor children and their prayer for payment of an extremely modest survivors' annuity prescribed by an Act of

9/ See Government's brief, pg. 18.

Congress.

In any event, the Court of Claims plainly has jurisdiction, under 28 U.S.C. 1491 –

> "to render judgment on any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort . . . . To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any judgment, issue orders directing . . . placing in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just."

Thus, it is clear beyond peradventure that both the Government's stipulation for judgment, and the judgment entered on that stipulation by the Court of Claims in this

case, are well within the broad jurisdiction bestowed on that court by Congress. Indeed, throughout its entire history, since it was established in 1855, the Court of Claims has had jurisdiction over money claims against the United States based on Acts of Congress (United States v. King, 395 U.S. 1, 2-3, 89 S.Ct. 1501, 1502 (1969); United States v. Testan, 424 U.S. 392, 397-98, 96 S.Ct. 948, 953, 47 L.Ed. 2d 114 (1976)). In this case, Shawn's and Tricia's claim is strictly a money claim for statutory survivors' annuity based on an Act of Congress, the Civil Service Retirement Act (5 U.S.C. 8341(e)). That Act of Congress specifically sets forth the amounts of money due and payable to children of deceased federal employees (5 U.S.C. 8341(e)), and here the suit in the Court of Claims seeks collection of that statutory debt of the United States to Shawn and Tricia, the children of

a deceased federal employee covered by that statute.

Their claim asserts, and the Court of Claims has ruled, that the Civil Service Retirement Act "confers a substantive right to recover money damages from the United States" (United States v. Testan, supra, at 424 U.S. 398). By expressly providing a statutory commitment to pay specific survivors' annuity to children of deceased federal employees – even to adopted children and stepchildren (5 U.S.C. 8341(a)(3)(A))– the United States waived its sovereign immunity and made itself statutorily liable for such payments in the Court of Claims (United States v. Testan, supra, at 424 U.S. 399). And, having rendered judgment against the United States on that statutory money claim, the Court of Claims had the additional statutory authority under 28 U.S.C. 1491 to direct the administrators of the

Civil Service Retirement Act to place Shawn and Tricia on the annuity rolls for future payments, as the Government itself specifically directed in its written stipulation.

Moreover, this Court has recently repeatedly approved payment of federal survivors' benefits in cases where discriminatory provisions of the federal statute providing such benefits were stricken on constitutional grounds – in other words, the benefits were ruled payable under the statute with the unconstitutional requirements deleted (Weinberger v. Wiesenfeld, 420 U.S. 636, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975), affg. 367 F.Supp. 981; Califano v. Goldfarb, 430 U.S. 199, 97 S.Ct. 1021, 51 L.Ed.2d 270 (1977), affg. 396 F.Supp. 308). And, in Gentry v. United States, 212 Ct.Cl.1 546 F.2d 343 (1976), rehearing denied, 212 Ct. Cl.27, 551 F.2d 852 (1977), the

Court of Claims flatly rejected all jurisdictional arguments advanced by the Government in this Court, and the Government failed to appeal.

The Government completely failed to question the Court of Claims' jurisdiction in its answer in this case (A. 20, 21) – and based on its subsequent stipulations and concessions, the Court of Claims entered judgment for Shawn and Tricia clearly within the bounds of its jurisdiction under 28 U.S.C. 1491. In the face of this record and in light of the aforementioned authorities, the Government's baseless attempt to create for the first time some vague jurisdictional issue in this Court on a direct appeal under 28 U.S.C. 1252 must be rejected.

III

IT IS UNNECESSARY FOR THIS COURT TO REACH THE CONSTITUTIONAL ISSUES RAISED BY THE GOVERNMENT'S APPEAL BECAUSE, UNDER THE FACTS OF THIS CASE, SHAWN AND TRICIA MEET ALL THE STATUTORY REQUIREMENTS OF 5 U.S.C. 8341 FOR A SURVIVORS' ANNUITY. IF THE COURT AGREES, THE GOVERNMENT'S APPEAL UNDER 28 U.S.C. 1252 MUST BE DISMISSED BECAUSE NO REAL CONSTITUTIONAL ISSUE WOULD REMAIN IN THIS CASE

5 U.S.C. 8341(a)(3)(A), as pertinent to this case, provides:

> "(a) For the purpose of this section — . . .
>
> "(3) 'child' means —
>
> "(A) an unmarried child under 18 years of age, including (i) an adopted child, and (ii) a stepchild or recognized natural child who lived with the employee or Member in a regular parent-child relationship . . .."

In this case, in response to the Civil Service Commission's request for at least two (2) affidavits (A. 5), three (3) affidavits by disinterested parties were filed with the Government which established that Shawn and Tricia "lived with" their deceased father and their mother in the same domicile "in a regular parent-child relationship" during the period from their respective births through 1971 (A. 5-7).

Thereafter, in 1972, the father not only "recognized" Shawn and Tricia, he appeared in a formal Montana court proceeding wherein he was adjudged their father (App. A. to this brief). He was thereupon ordered by the Montana court to support the two children, and he did support them to the date of his death in 1974, and even after his death, through life insurance payments (A. 6, 7; Appendix A hereto).

Patently, therefore, Shawn and Tricia meet all the requirements of 5 U.S.C. 8341 (a)(3)(A), and thus they are entitled to the survivors' annuity they claim under the statute as it was enacted by Congress. They "lived with" the deceased federal employee "in a parent-child relationship" through 1971, and he not only "recognized" them — he was judicially decreed their

father and he was responsible for their support through the date of his death under that decree. Ergo, the Court of Claims correctly entered summary judgment in favor of Shawn and Tricia, as a matter of law, stating (A. 27):

> "In summary, on the uncontested facts of parentage, recognition, and support, plaintiffs have shown that they have a right to recover the benefits provided by 5 U.S.C. §8341(e)."

Accordingly, we respectfully urge this Court to construe 5 U.S.C. 8341 in the same manner at this time, and thereby affirm the Court of Claims' judgment without reaching the constitutional questions spuriously raised by the Government's appeal. In such event, of course, (a) all "issues" raised by the Government regarding the Court of Claims' jurisdiction would automatically fall, and (b) the Government's direct appeal under 28 U.S.C. 1252 would have to be dismissed because no real constitutional

issue would remain for review.

Indeed, this case never would have reached the Court of Claims in the first place if the Civil Service Commission and its Board of Appeals and Review had correctly construed 5 U.S.C. 8341(a)(3)(A), as plainly enacted and intended by Congress. As shown above, under that statute as drafted by Congress, adopted children, stepchildren and recognized natural children all qualify for survivors' annuities if they can show they "lived with the employee . . . in a regular parent-child relationship." Here Shawn and Tricia proved they "lived with" their deceased father in a parent-child relationship (i.e., openly in the same domicile) through 1971. This, we respectfully submit, was a sufficient showing to meet the statutory requirement. But, the Commission arbitrarily and capriciously misconstrued the statutory requirement,

stating (A. 6, 7):

> ". . . acknowledged illegitimate children may be entitled to a survivor annuity if . . . they lived with an employee in a regular parent-child relationship . . . .
>
> "The Commission has constantly held that the 'living with' requirement is not met when the parent maintains a residence different from the child or if the parent and child are not living together at the time of the employee's death. The use of the language "had lived" in the instructional material in the FPM is not viewed as meaning that the existence of a past parent-child relationship qualifies the child for a survivor annuity. The provision of the retirement law which defines the term 'child' for survivor annuity purposes also speaks in the past tense, but this is understandable since the death of the employee terminates the relationship. However, it is the Commission's position that the circumstances in a particular case must be such as to establish that the "lived in a parent-child relationship" existed to the time of death of the employee. There is no such showing in this case.
>
> "The certificate of death of George Gerald Isaacson indicates that his date of death was August 17, 1974. The affidavits . . . stated that the alleged ["lived with"] relationship existed from either 1965 or 1966 until 1971. Indeed, the formal decree of the Montana court, in which the decedent was ordered to support the children, is dated June 9, 1972. Under the circumstances, the Board must conclude that the decedent did not live in a parent-child relationship with the children from at least 1972 until the date of his death in 1974." [Emphasis supplied.]

The Commission thus totally misconstrued the governing statute. There is nothing in 5 U.S.C. 8341(a)(3)(A) which mandates that a child "live with" his deceased father to the very moment of his death in order to qualify for an annuity. Rather, the statute merely requires a showing that the child "lived with" the parent at some time in the past.

Moreover, the Commission arbitrarily and capriciously distorted and ignored the true facts and the true meaning of the Montana decree in this case. The Commission admits a formal decree of a Montana court issued on June 2, 1972

which judicially decreed the parent-child relationship between Mr. Isaacson, Shawn and Tricia, and that Isaacson was "ordered to support the . . . children" (A. 7). But, the Commission nevertheless erroneously concludes (A. 7): "Under the circumstances, the Board must conclude that the decedent did not live in a parent-child relationship with the . . . children from at least 1972 until the date of his death in 1974."

For these reasons, appellee urges this Court to affirm the judgment of the Court of Claims through a fair, just construction of the governing statute; to resolve this case without reaching the constitutional issues so belatedly and speciously raised by the Government; and to dismiss the Government's appeal because then it would present no necessary constitutional issue for review.

IV

UNDER THE FACTS OF THIS CASE, THE FIFTH AMENDMENT PROHIBITS THE GOVERNMENT FROM DISCRIMINATORILY APPLYING THE "LIVED WITH" REQUIREMENT OF 5 U.S.C. 8341 TO DEPRIVE SHAWN AND TRICIA OF THEIR SURVIVORS' ANNUITY

Under 5 U.S.C. 8341(a)(3)(A), a child whose federal employee father was formally married to the child's mother automatically qualifies for an annuity without the need to show that he ever "lived with" his father or that he even knew his father personally, and irrespective of the fact that his parents may have separated and been divorded years ago.

Similarly, under 5 U.S.C. 8341(a)(3)(A), an adopted child, a stepchild, and even a child for whom a mere petition of adoption was filed likewise automatically qualify for an annuity if they show they lived with a deceased federal employee in a parent-child relationship at the time of his death. Also, a recognized natural

child qualifies for an annuity under the statute, as arbitrarily misconstrued and applied by the Government, if fortunately he too simply lived with the deceased employee in a parent-child relationship at the time of the employee's death.

But, in this case, the Government proposes to deny the same statutory annuity to Shawn and Tricia, albeit the evidence shows (a) they "lived with" the deceased employee in an open parent-child relationship for years prior to 1971, (2) after a full trial, that parent-child relationship was meticulously adjudged and confirmed by a valid Montana decree, and (3) pursuant to the deceased employee's stipulation in the Montana proceeding, the decree in that case ordered him both to provide monthly support payments to Shawn and Tricia and to name them his life insurance beneficiaries at death (A. 6, 7; App. A. hereto). The sole reason stated for this insidious discrimination is that federal admini-

strators construe 5 U.S.C. 8341(a)(3)(A) to require a showing that Shawn and Tricia physically lived with the deceased employee at the very moment of his death.

In Point III, supra, we demonstrated why that baseless statutory construction should be rejected by this Court. But, if it is allowed to stand, then appellee respectfully submits 5 U.S.C. 8341(a)(3)(A), thus applied, is violative of the Fifth Amendment (Jimenez v. Weinberger, 417 U.S. 628, 637, 94 S.Ct. 2496, 41 L.Ed. 2d 363 (1974); Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954); Gentry v. United States, supra; Tenny v. United States, supra; Proctor v. United States, supra, Myers v. Hampton, supra; Jenkins v. U. S. Civil Service Commission, 460 F. Supp. 611, app. pend. No. 79-1199). As stated by the Court of Claims in Gentry, at 546 F.2d 352:

"The live-with requirement causes the annuity statute to be underinclusive, presumptively denying benefits to nonresident illegitimates who may be dependent. In concluding that the requirement cannot withstand constitutional scrutiny, we can only echo the Court's final remarks in Jimenez. For all that appears from the papers before us, the two subclasses of illegitimates stand on an equal footing, the potential for spurious claims does not differ one to the other, and the different treatment of legitimates, which serves as a guide to the overall purpose of the statute, remains unexplained. On this basis, 'to conclusively deny one subclass benefits presumptively available to the other denies the former the equal protection of the laws.' 417 U.S. at 637, 94 S.Ct. at 2502. The live-with requirement denies plaintiff due process in violation of the Fifth Amendment."

As indicated, in Gentry the Court of Claims pegged its rulings on this Court's decision in Jimenez v. Weinberger, supra. It also carefully distinguished its rulings under 5 U.S.C. 8341 from this Court's subsequent decision in Matthews v. Lucas, 427 U.S. 495, 96 S.Ct.

2755, 49 L.Ed.2d 651 (1976), upon which the Government relies so heavily in the case at bar, stating at 546 F.2d 352:

"The significant point, and indeed the one that distinguishes Jimenez and the present case from Lucas, is that the excluded illegitimates were nevertheless permitted under the statutory scheme to establish their residence with or dependency on the insured, and thus qualify for benefits. The Court specifically stated: ' * * * this conclusiveness in denying benefits to some classes of afterborn illegitimate children, which belied the asserted legislative reliance on dependency in Jimenez, is absent here, for, as we have noted, any otherwise eligible child may qualify for survivorship benefits by showing contribution to support or cohabitation, at the time of death.' 427 U.S. at 512, 96 S.Ct. at 2765. Thus, the statute comported with the announced purpose of aiding dependents. The Court found no constitutional defect in Congress' attempt to approximate those who might be dependent, where this did not entail cutting off from benefits those who actually were dependent and did not base the demarcation line on the legitimacy of birth. In

this case, however, as in Jimenez, the classification barring benefits to a subclass of illegitimates frustrates the dependency support scheme, and does so by employing birth status as the index to entitlement."

The vital difference between the case at bar and the situation involved in Matthews v. Lucas, however, was stated even more succinctly by this Court in its decision in Matthews v. Lucas, at 427 U.S. 497 as follows:

"He [the deceased father] died without even having acknowledged in writing his paternity of either Ruby or Darin, and it was never determined in any judicial proceeding during his lifetime that he was the father of either child."

In the case at bar, it was determined in a judicial proceeding during the lifetime of the deceased federal employee that he was the father of both Shawn and Tricia, and he was obliged by judicial decree to support, and did support the children to his death. Thus, as

this Court stated in Matthews v. Lucas, at 427 U.S. 513:

"The presumption of dependency [may be] withheld only in the absence of any significant indication of the likelihood of actual dependency . . .. [W]e agree with the assessment of the three-judge court as it originally ruled in Norton v. Weinberger, 364 F.Supp. 1117, 1128 — :

". . .. When an order of support is entered by a court, it is reasonable to assume compliance occurred. A paternity decree . . . would almost as strongly suggest support was subsequently obtained . . .."

Similarly, in Trimble v. Gordon, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977), this Court ruled that an Illinois statute unconstitutionally discriminated against a child born out of wedlock by providing the child could not inherit from her intestate father unless the father had "acknowledged" her and had also thereafter "legitimated" her by marrying her mother. The Court concluded that these requirements were not substan-

tially related to permissible state interests and that they violated the Equal Protection Clause in a case where the parent-child relationship had been established by judicial decree while the deceased father was alive, and where that judicial decree had found the father responsible for the child's support.

In Lalli v. Lalli, ____ U.S. ____, 99 S.Ct. 518 (1978), New York allowed illegitimate children to inherit from intestate fathers only in cases where a court of competent jurisdiction entered a paternity decree against the father during his lifetime. This Court, consistent with its decision in Trimble v. Gordon, upheld the New York law, stating at 99 S.Ct. 526, 527:

> "Fraudulent assertions of paternity will be much less likely to succeed, or even to arise, where the proof is put before a court of law at a time when the putative father is available to respond, rather than first brought

> to light when the distribution of the assets of an estate is in the offing . . ..
>
> "The Illinois statute in Trimble was constitutionally unacceptable because it effected a total statutory disinheritance of children born out of wedlock who were not legitimated by the subsequent marriage of their parents. The reach of the statute was far in excess of its justifiable purposes. Section 4-1.2 [of the New York law] does not share this defect. Inheritance is barred only when there has been a failure to secure evidence of paternity during the father's lifetime . . .. This is not a requirement that inevitably disqualifies an unnecessarily large number of children born out of wedlock."

This Court emphasized in Lalli that governments are free to require proof of paternity by means other than judicial decree (99 S.Ct. 526, ftnt. 8), but Matthews v. Lucas, Trimble v. Gordon and Lalli v. Lalli, read together, make it clear that arbitrary state or federal exclusions of illegitimate chldren from intestate inheritance or statutory sur-

vivors' benefits are unconstitutional in any case where, as here, during the deceased father's lifetime, a court of competent jurisdiction entered both a valid paternity decree and a judgment ordering him to support his lawful children.

Califano v. Boles, ____ U.S. ____, 99 S.Ct. ____ (1979), decided last June just before the end of this Court's 1978 term, is thus clearly inapposite to this case. First, that case involved a claim for "Mother's Benefits" under the Social Security Act, not direct children's survivor annuities under the Civil Service Retirement Act. Surviving mothers of deceased workers are entitled to "Mother's Benefits" under the Social Security statute only if they are found to be the surviving wife or surviving divorced wife of the father, the wage earner. Thus, the status of children such as Shawn and Tricia in this case was not directly in-

volved in Califano v. Boles, and the Court thus had no reason or occasion to consider in any respect the effect of valid paternity decrees and judgments of support entered in favor of children during the deceased wage earner's lifetime.

In sum and substance, therefore, if this Court concludes the summary judgment entered by the Court of Claims in this case in favor of Shawn and Tricia was indeed based on a finding that the "lived with" requirement of 5 U.S.C. 8341 — as applied by the Government to require a showing that the children physically lived with the deceased father under the same roof up to the very moment of his death — is unconstitutional, we respectfully submit that judgment must be affirmed. Here, the record shows that Shawn and Tricia did live with their deceased father for a considerable period of time, but more decisively, a Montana court of competent

jurisdiction entered both a paternity decree and judgment of support in favor of Shawn and Tricia during their father's lifetime. The Government's application of 5 U.S.C. 8341 to deny them their survivors' annuity was far too narrow and totally unreasonable, and it was foreign to any valid interest of the United States under the Civil Service Retirement Act which seeks to guarantee survivor annuities to all types of unmarried children under 18 years of age — even adopted children, stepchildren and children for whom a petition of adoption was pending when a federal employee dies.

As the Government states in its brief, at pages 27-31, "The Civil Service annuities for survivors are designed to replace support that may have been lost by the wage-earner's death." Here, the wage earner father was ordered by a Montana court to support Shawn and Tricia

and he did support them to the date of his death. Patently, the statutory annuity will operate in this case to replace that support which was lost when Mr. Isaacson accidentally died in 1974.

V

THE "LIVED WITH" REQUIREMENT, AS APPLIED BY THE GOVERNMENT IN THIS CASE, CANNOT BE UPHELD AS NECESSARY TO PREVENT SPURIOUS CLAIMS OR TO FACILITATE ADMINISTRATION OF THE CIVIL SERVICE RETIREMENT ACT IN THE FACE OF (A) THE GOVERNMENT'S FAILURE TO APPEAL FROM A LINE OF DECISIONS WHICH EITHER NULLIFIED THE PROVISION OR ENJOINED ITS ENFORCEMENT AND (B) THE GOVERNMENT'S CURRENT LEGISLATIVE EFFORT PERMANENTLY TO REPEAL THAT REQUIREMENT

In a last-ditch effort to salvage its arbitrary, capricious application of the "lived with" requirement, the Government argues in its brief that it is necessary to discourage spurious claims and to facilitate efficient administration of the annuity statute.

But, at least five (5) courts in the federal system nullified or enjoined fur-

ther enforcement of that requirement before the Government sought to resuscitate it by a belated appeal in this case (Gentry v. United States, supra; Myers v. Hampton, supra; Tenny v. United States, supra; Proctor v. United States, supra; Jenkins v. United States, supra). In each instance, the courts carefully explained why the Government's "spurious claim" and "facilitation of administration" arguments are completely unsustainable in this instance. If preservation of that requirement was truly essential to the prevention of spurious claims or proper administration of the Act, why did the Government acquiesce in those other cases and wait until now to file an appeal in this Court?

Moreover, if preservation of that capricious requirement is so vital to the prevention of spurious claims and to proper administration of the Act, why did the Government itself ask Congress earlier

this year to expedite its complete legislative repeal (Appendix B to this brief)? In this regard, the Government's brief states in a secluded footnote: 10/

> "OPM has recommended legislation that would eliminate the lived-with requirement."

Frankly, the Government's entire position in this case is unfathomable in light of the testimony the head of the Civil Service Retirement System gave before the House Subcommittee on Compensation and Employee Benefits on July 24, 1979, as follows (Appendix C to this brief):

> "The proposed legislation which we have submitted, and which is identical to H.R. 2584, would clarify the statutory purpose of replacing lost support. In this respect, the Office of Personnel Management anticipates that a support requirement would be deemed to be met by all legitimate children, adopted children, and all recognized natural children for whom a judicial determination of support had been obtained. In other words, payment would be made as long as

10/ Government's brief, pg. 38, ftnt. 34.

there was a legal duty of the decedent to support the child. The support requirement would not be met by illegitimate children who received no support from the decedent and who had not obtained any judicial declaration of a support obligation. We support early enactment of H.R. 2584."

In this case, Shawn and Tricia obtained a "judicial declaration of [their father's] support obligation." Why then should this Court adopt a standard in this case which is different from the standard the Government is presently promoting in Congress?

Obviously therefore, the Government's arguments in this regard are utterly baseless, and in justice, they must be overruled by the Court in this case where patently, the claims are valid and readily administrable. 11/

11/ It is clearly wrong for the Government to suggest in its brief that an annuity claim "could be fabricated" in a case such as this, where during the deceased father's lifetime, a court of competent jurisdiction established both his paternity and obligation to support the children (see Government's brief, pg. 35.

--Continued on pg. 57

CONCLUSION

Appellee's motion to dismiss the Government's appeal should be granted, or in the alternative, the judgment of the Court of Claims should be affirmed.

Respectfully submitted,

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It is also irresponsible for the Government to argue here that some annuity claims may not be filed for 30 years, and that lump sum payments made to other annuitants may then be unrecoverable. Here, the claim was filed on behalf of Shawn and Tricia in 1974, immediately after their father's death. The lump sum payment was made to the decedent's father only after Shawn's and Tricia's claim was denied, and even then the grandfather voluntarily undertook to refund it to the Government if Shawn's and Tricia's claim is sustained – and, of course, he did not defend against the Government's claim for refund in the Court of Claims which the court allowed (see A. 4, 6, 9, 31).

APPENDIX A

APPENDIX A

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BROADWATER

No. 5625

PATRICIA ILENE CLARK, *Plaintiff*,

v.

GEORGE GERALD ISAACSON, *Defendant*.

Findings of Fact, Conclusions of Law and Judgment

The above-entitled cause came on regularly for trial on the 15th day of May, 1972, before the Court sitting without a jury, Hubert J. Massman, of the Law Firm of Massman, Funk & Swanberg, Horsky Block, Helena, Montana, appearing as counsel for the Plaintiff, and Lloyd J. Skedd, 1225 Eleventh Avenue, Helena, Montana, appearing as counsel for the Defendant, and said action being tried on the 15th, 16th and 17th days of May, 1972, and evidence both oral and documentary having been introduced for and on behalf of the respective parties, and said cause having been duly submitted for decision, and the Court having considered the evidence and the law applicable thereto finds as facts the following:

Findings of Fact

1. That the Plaintiff, PATRICIA ILENE CLARK, is the mother of SHAWN DOUGLAS CLARK, who was born at St. John's Hospital, Helena, Montana, on April 13, 1968, and of TRICIA DEANNE CLARK, who was born at St. Peter's Hospital, Helena, Montana, on January 28, 1971;

2. That the Defendant, GEORGE GERALD ISAACSON, is the father of SHAWN DOUGLAS CLARK and TRICIA DEANNE CLARK, above described;

3. That GEORGE GERALD ISAACSON is regularly employed and is earning a gross annual salary in excess of Twelve Thousand Five Hundred and no/100 Dollars ($12,000.00), and that PATRICIA ILENE CLARK is regularly employed and is earning a gross annual salary in excess of Eight Thousand Five Hundred and no/100 Dollars ($8,500.00);

4. That the parties stipulated in open Court as follows:

(a) Defendant pay Plaintiff on or before the 1st day of June, 1972, the sum of Five Thousand and no/100 Dollars ($5,000.00) in full and final settlement of any and all past obligations of every kind and nature whatsoever.

(b) Defendant shall change the beneficiaries on the following policies to make SHAWN DOUGLAS CLARK and TRICIA DEANNE CLARK first beneficiaries:

(1) New York Life Insurance Policy for Ten Thousand and no/100 Dollars ($10,000.00);

(2) Federal Employees Group Life Insurance Policy for Fifteen Thousand and no/100 Dollars ($15,000.00).

(c) Defendant pay Plaintiff the sum of Sixty and no/100 Dollars ($60.00) per month for each of the said minor children, SHAWN DOUGLAS CLARK and TRICIA DEANNE CLARK, Ten and no/100 Dollars ($10.00) of which represents medical insurance coverage;

5. The Court finds that the stipulations of the parties are fair and reasonable under the circumstances of this case.

Conclusions of Law

1. That PATRICIA ILENE CLARK is the monther, and GEORGE GERALD ISAACSON is the father, of SHAWN DOUGLAS CLARK, born at St. John's Hospital in Helena, Montana, on April 13, 1968, and of TRICIA DEANNE CLARK, who was born in St. Peter's Hospital in Helena, Montana, on January 28, 1971.

2. That the stipulations of the parties, found reasonable and just by this Court, should be made a part of the Judgment in this cause.

Judgment

Upon the foregoing Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

(1) That the Defendant, GEORGE GERALD ISAACSON, is the father of SHAWN DOUGLAS CLARK, who was born in St. John's Hospital, Helena, Montana, on April 13, 1968, and of TRICIA DEANNE CLARK, who was born at St. Peter's Hospital in Helena, Montana, on January 28, 1971.

(2) That Defendant pay to the Plaintiff on or before the 1st day of June, 1972, the sum of Five Thousand and no/100 Dollars ($5,000.00) as full and final settlement of all past obligations between the parties of every kind and nature whatsoever.

(3) That Defendant pay to the Plaintiff, through the Clerk of the above-entitled Court, the sum of Sixty and no/100 Dollars ($60.00) per month for each of the said children (Ten and no/100 Dollars ($10.00) of which shall represent medical insurance costs for each child); said payments shall commence on the 1st day of June, 1972, and shall be paid on the 1st day of each month thereafter until such time as each of the said children shall reach their age of majority.

(4) That Defendant change the beneficiaries under the following policies to make SHAWN DOUGLAS CLARK and TRICIA DEANNE CLARK first beneficiaries, to-wit:

(a) New York Life Insurance Policy in the amount of Ten Thousand and no/100 Dollars ($10,000.00).

(b) Federal Employees Group Life Insurance Policy in the amount of Fifteen Thousand and no/100 Dollars ($15,000.00).

The change in beneficiaries herein ordered shall be subject to Court approval.

DATED this 2nd day of June, 1972.

/s/ GORDON R. BENNETT
District Judge

APPENDIX B

96TH CONGRESS
1ST SESSION

H. R. 2584

To amend title 5, United States Code, to provide survivor benefits to certain dependent children.

IN THE HOUSE OF REPRESENTATIVES

MARCH 1, 1979

Mrs. SPELLMAN (by request) introduced the following bill; which was referred to the Committee on Post Office and Civil Service

---

A BILL

To amend title 5, United States Code, to provide survivor benefits to certain dependent children.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 8341(a)(3) of title 5, United States Code, be amended to read as follows:

"(3) 'child' means—

"(A) an unmarried dependent child under 18 years of age, including (i) an adopted child, (ii) a stepchild or recognized natural child, and (iii) a child who lived with and for whom a petition of

adoption was filed by an employee or Member, and who is adopted by the surviving spouse of the employee or Member after his death;

"(B) such unmarried dependent child regardless of age who is incapable of self-support because of mental or physical disability incurred before age 18; or

"(C) such unmarried dependent child between 18 and 22 years of age who is a student regularly pursuing a full-time course of study or training in residence in a high school, trade school, technical or vocational institute, junior college, college, university, or comparable recognized educational institution.

For the purpose of this paragraph and subsection (e) of this section, a child shall be deemed dependent on the employee or Member if, at the time of the employee or Member's death, the employee or Member was either living with or contributing to the support of such child. The Office of Personnel Management shall prescribe regulations to further define dependency for purposes of this section. A child whose 22d birthday occurs before July 1 or after August 31 of a calendar year and while he is regularly pursuing such a course of study or training, is deemed to have become 22 years

of age on the first day of July after that birthday. A child who is a student is deemed not to have ceased to be a student during an interim between the school years if the interim is not more than 5 months and if he shows to the satisfaction of the Office of Personnel Management that he has a bona fide intention of continuing to pursue a course of study or training in the same or different school during the semester (or other period into which the school year is divided) immediately after the interim.".

SEC. 2. Section 8901(5) of title 5, United States Code, is amended to read as follows:

"(5) 'member of family' means the spouse of an employee or annuitant and an unmarried dependent child under 22 years of age, including—

"(A) an adopted child; and

"(B) a stepchild, foster child, or recognized natural child or such an unmarried child regardless of age who is incapable of self-support because of mental or physical disability which existed before age 22.

For purposes of this paragraph, a child shall be deemed dependent on the employee or Member if the employee or Member is either living with or contributing to the support of such child. The Office of Person-

nel Management shall prescribe regulations to further define dependency for purposes of this section.".

SEC. 3. This Act shall take effect upon enactment except that no benefits under chapter 89 of title 5, United States Code, authorized by this Act shall be payable for any period prior to the date of enactment.

O

APPENDIX C

STATEMENT OF RAYMOND C. WEISSENBORN,
DIRECTOR, COMPENSATION DIVISION, OFFICE OF PERSONNEL MANAGEMENT

BEFORE

SUBCOMMITTEE ON COMPENSATION AND EMPLOYEE BENEFITS
COMMITTEE ON POST OFFICE AND CIVIL SERVICE
U.S. HOUSE OF REPRESENTATIVES

ON

H.R. 2583, TO DISCONTINUE CIVIL SERVICE ANNUITY PAYMENTS FOR PERIODS OF EMPLOYMENT AS A JUSTICE OR JUDGE OF THE UNITED STATES; ~~H.R. 2584, TO PROVIDE SURVIVOR BENEFITS TO CERTAIN DEPENDENT CHILDREN;~~ AND S. 383, TO EXTEND CERTAIN BENEFITS TO FORMER EMPLOYEES OF COUNTY COMMITTEES ESTABLISHED PURSUANT TO SECTION 8(b) OF THE SOIL CONSERVATION AND DOMESTIC ALLOTMENT ACT.

Tuesday, July 24, 1979

I would next like to discuss the provisions of H.R. 2584, which pertains to providing survivor benefits to certain dependent children of deceased federal employees and annuitants.

The Civil Service Retirement law currently requires that a recognized

-

natural child has to be living with his or her deceased parent in a regular parent-child relationship in order to be eligible for a child's survivor annuity benefit. However, this "living-with" requirement has been declared unconstitutional in several recent court decisions.

On November 30, 1977, a three-judge court for the U.S. District Court for the District of Columbia enjoined the Office of Personnel Management's predecessor agency, the Civil Service Commission, from applying the "living-with" requirement to recognized natural children of a deceased federal employee (Reference: Proctor v. United States). This case was followed by Jenkins v. United States Civil Service Commission, in which the Office of Personnel Management has been ordered by the same district court now to pay benefits retroactively to the day following the employee's death to recognized natural children of all employees or retirees whose death occurred on or after February 24, 1972. Retroactive payment prior to December 1, 1977, has been stayed by the court pending a decision by the Supreme Court in Clark v. United States, still another case involving payment of survivor benefits to non-resident recognized natural children. In Clark, the Supreme Court will consider both the constitutionality of the "living-with" requirement and whether or not, if the statute is not constitutional, retroactive payments can be ordered.

It is apparent that the elimination of the "living-with" requirement by these court decisions warrants a reconsideration of the definition of

"child" for civil service survivor annuity purposes. The proposed legislation which we have submitted, and which is identical to H.R. 2584, would clarify the statutory purpose of replacing lost support. In this respect, the Office of Personnel Management anticipates that a support requirement would be deemed to be met by all legitimate children, adopted children, and all recognized natural children for whom a judicial determination of support had been obtained. In other words, payment would be made as long as there was a legal duty of the decedent to support the child. The support requirement would not be met by illegitimate children who received no support from the decedent and who had not obtained any judicial declaration of a support obligation. We support early enactment of H.R. 2584.

FOR ARGUMENT

Supreme Court, U.S.
FILED
OCT 17 1979
MICHAEL RODAK, JR., CLERK

No. 78-1513

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, APPELLANT

v.

PATRICIA ILENE CLARK, GUARDIAN FOR
SHAWN D. CLARK AND TRICIA D. CLARK

ON APPEAL FROM THE
UNITED STATES COURT OF CLAIMS

REPLY BRIEF FOR THE UNITED STATES

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1513

UNITED STATES OF AMERICA, APPELLANT

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ON APPEAL FROM THE UNITED STATES COURT OF CLAIMS

REPLY BRIEF FOR THE UNITED STATES

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1. Appellees suggest (Br. 34-40) that this Court need not reach the constitutional issue presented, because they satisfy the statutory lived-with requirement. They base this assertion on affidavits in the record indicating that they lived in a regular parent-child relationship with Isaacson until about 2 1/2 years before his death (A. 6-7). Appellees challenge the Commission's interpretation of the statute as requiring a showing that the residency requirement was met at the time of death. But that interpretation is entirely consistent with the fundamental purpose of the Civil Service Retirement Act—the replacement of support lost by the wage-earner's death. As we argue in our main brief (pages 27-31), Congress reasonably concluded that illegitimate children who were living with the wage-earner when he died were the ones

most likely to have lost support at his death.[1] Others, like appellees, who stopped living with the wage-earner several years before his death, are presumed to have lost support at that time and not at the time of death.[2]

2. Amicus Jenkins is in error in asserting (Br. 19 *et seq.*) that the Act impermissibly discriminates against illegitimate children. This is not a statute that totally denies benefits to illegitimates, or even one that applies different standards to all illegitimate than to all legitimate children. Instead, the statutory classification is based on the likelihood of support. Legitimate children, adopted children (whether legitimate or illegitimate), and those illegitimate children and stepchildren who were living with the wage-earner at the time of his death receive benefits; stepchildren and illegitimate children who were not living with the wage-earner do not. Stepchildren are treated exactly like illegitimate ones—their entitlement to benefits depends on whether they were living with the wage-earner at his death.

The congressional judgment that illegitimate children who were not living with the wage-earner at the time he died are substantially less likely to have been supported by the wage-earner than legitimate children in the same

[1]Appellees misinterpret the Commission's interpretation of the Act as requiring that they show that they were living under the same roof as the wage-earner at the moment of his death (Br. 18d, 39, 43, 51). As the Civil Service Board of Appeals and Review explained (A. 7), "periodic or temporary separation does not bar 'living with', [but] the circumstances must indicate that the child and parent have shared and again expect to share a common roof or resume a common residence when conditions permit."

[2]Appellees assert (Br. 11, 18e, 18g, 35, 46) that Isaacson in fact continued to support them. As we point out in our main brief (page 8 n. 9), that assertion is not supported by the record. It is, in any event, irrelevant. See *Califano* v. *Boles*, No. 78-808 (June 27, 1979), slip op. 2-3, 11.

situation is confirmed by a recent survey conducted by the Bureau of the Census. In a report issued in June 1979, the Bureau reports that "42 percent of currently divorced mothers with at least one child present in their homes received child support payments, compared to 26 percent of remarried mothers, 18 percent of separated mothers, and only 4 percent of never-married mothers." Bureau of the Census, U.S. Department of Commerce, *Divorce, Child Custody, and Child Support*, Special Studies Series P-23, No. 84, p. 4 (1979). Thus here, in contrast to *Jimenez* v. *Weinberger*, 417 U.S. 628, 634-635 (1974), the statutory classifications accurately reflect the likelihood of lost support; the means chosen by Congress are appropriately tailored to the end of replacing lost support.

3. Amicus notes that an estimated 10,000 to 22,000 illegitimate children are denied benefits by the challenged provision (Br. 28, n. 10). The census figures noted above indicate that the statutory conclusion that those children were not dependent on the wage-earner when he died is correct for 9,600 to 21,200 of those children and incorrect for only 400 to 800. Here, as in *Mathews* v. *Lucas*, 427 U.S. 495, 516 (1976), Congress' assumptions concerning dependency are "reasonably supportive of its conclusions that individualized factual inquiry in order to isolate each nondependent child * * * is unwarranted as an administrative exercise." Moreover, if the lived-with requirement were struck from the statute, the effect apparently would be to render the statute vastly over-inclusive, for the statute would then contain no dependency requirement for any illegitimate child.[3] In order to permit the 400

[3]The Court of Claims on motion for rehearing in *Gentry* v. *United States*, 551 F. 2d 852, 855 (1977), apparently assumed that the Commission could still require some showing of dependency for illegitimate children. Appellees (Br. 36, 55-56) and Amicus (Br. 27-29) repeat this assumption without identifying any statutory basis for the support requirement.

to 800 children who actually received some support from the wage-earner to recover benefits, thousands of children who received no support would also be added to the rolls. This problem would be avoided by the legislative proposal currently before Congress (Appellee's Br. App. B), which defines a child as "an unmarried dependent child" and specifies the situations in which a child is to be deemed dependent. The proposal advocated by OPM thus avoids the over-inclusiveness that would result from a judicial decision of unconstitutionality.

4. Amicus suggests (Br. 7-19) that the government's jurisdictional argument turns simply on the question whether the lived-with requirement is severable. But the determination that the provision is severable only raises the jurisdictional issue, it does not resolve it. Unless the provision is severable, the question of appellees' entitlement to retroactive benefits simply does not arise. Our claim is that even *assuming* the lived-with requirement is severable and that a district court could therefore appropriately award appellees prospective relief, they are not entitled to retroactive benefits, since they can point to no statute that " 'in itself * * * can fairly be interpreted as mandating compensation by the Federal Government.' " *United States* v. *Testan*, 424 U.S. 392, 402 (1976), quoting from *Eastport S.S. Corp.* v. *United States*, 372 F. 2d 1002, 1008, 1009 (Ct. Cl. 1967).

Amicus contends that the Act, with the offending provision "read out" of it, provides the necessary statutory authority (Amicus Br. 19; cf. Appellee's Br. 14-15). This claim assumes that once a court concludes that a portion of a statute is unconstitutional and severable, the statute must be read as if that portion had never been

included. But that assumption is incorrect.[4] The judicial gloss does not rewrite the statute—only Congress can do that. See *Califano* v. *Westcott*, No. 78-437 (June 25, 1979), slip op. 15. Instead, the court's decision means that the payments directed by the statute cannot constitutionally be limited to the statutory class, so that future payments must also include the class excluded by the statute.[5] It does not follow that retroactive payments must also be made to the excluded class.

Whether retroactive payments, which are in the nature of damages, may be judicially ordered is an entirely separate question. As we point out in our main brief (pages 17-24), the resolution of that question turns on whether there has been an explicit waiver of sovereign immunity permitting the court to award such benefits. The only conceivable waiver of sovereign immunity here, the provision for payment of benefits for up to 30 years after entitlement (5 U.S.C. 8345(h)(2)), was enacted to

[4]It is an assumption shared by the Court of Claims, which relied in *Gentry* v. *United States*, 546 F. 2d 343, 346 (1976), on *Norton* v. *Shelby County*, 118 U.S. 425 (1886), for the proposition that "[i]t is well established that an unconstitutional enactment is void *ab initio*." This Court has recently re-emphasized that, "[h]owever appealing the logic of *Norton* may have been in the abstract," the Court has abandoned its "principle of absolute retroactive invalidity" in favor of the realistic recognition that even unconstitutional enactments are hard facts that govern conduct until their unconstitutionality has been declared. *Lemon* v. *Kurtzman*, 411 U.S. 192, 198-199 (1973). Accord, *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371, 374 (1940); O. Field, *The Effect of an Unconstitutional Statute* 91 (1935).

[5]As this Court emphasized in *Westcott*, the alternative remedy is to direct the agency to pay no benefits at all under the unconstitutional provision. Under Amicus Jenkins' analysis, the entire statute would then have been void *ab initio*, and in the absence of any other statutory authority to make payments to the designated beneficiaries, the payments would be subject to recoupment.

limit the period within which the benefits provided by the statute could be claimed. See S. Rep. No. 94-540, 94th Cong., 1st Sess. (1975). It would be ironic indeed to read that statutory limitation as the explicit waiver of sovereign immunity required by *United States* v. *Testan*, *supra*.

For these reasons, as well as those discussed in our main brief, the judgment of the Court of Claims should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

OCTOBER 1979

DOJ-1979-10

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AUG 2 1979

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1513

UNITED STATES OF AMERICA,

Appellant,

v.

PATRICIA ILENE CLARK, Guardian for
SHAWN D. CLARK and TRICIA D. CLARK,

Appellee.

ON APPEAL FROM THE
UNITED STATES COURT OF CLAIMS

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF BARBARA JENKINS IN SUPPORT OF APPELLEE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1513

UNITED STATES OF AMERICA,

Appellant,

v.

PATRICIA ILENE CLARK, Guardian for
SHAWN D. CLARK and TRICIA D. CLARK,

Appellee.

ON APPEAL FROM THE
UNITED STATES COURT OF CLAIMS

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF BARBARA JENKINS IN SUPPORT OF APPELLEE

To the Honorable Chief Justice and
Associate Justices of the
Supreme Court of the United States:

Barbara Jenkins respectfully moves this Court, pursuant to Supreme Court Rule 42(1), for leave to file the accompanying brief in this matter as amicus curiae in

support of appellee. In support of this motion, Barbara Jenkins submits the following statement outlining her interests in the issues presented by this appeal:

1. Barbara Jenkins is the mother and next friend of Jeffrey Dale Hoffman, the recognized illegitimate child of a deceased federal employee. Because he did not live with his father, he was found ineligible by the Civil Service Commission for survivor annuity benefits pursuant to the provision which is the subject of this appeal, 5 U.S.C. § 8341(a)(3)(A)(iii). Through his mother, he then undertook a series of actions to assert his right, and that of other illegitimate children, to survivor annuity benefits.

2. First, Barbara Jenkins sought to intervene in the case then pending before the three-judge district court in the District of Columbia, *Proctor v. United States,* No. 76-436. She sought to intervene on behalf of a class of similarly situated individuals so that the constitutionality of the lived-with provision and the issue of retroactivity could be finally resolved for all members of the class. Although the motion to intervene was denied, the district court specifically requested her participation in the case as an amicus. She therefore filed a brief on the merits, and her attorneys argued the case along with the attorney for plaintiff Proctor before Judges MacKinnon, Green, and Parker.

3. After the *Proctor* decision, Jenkins filed a separate action in the district court for the District of Columbia, *Jenkins v. United States Civil Service Commission,* No. 78-317 (complaint filed February 24, 1978). She sought to bring the case as a class action, and it was so certified.

The government did not defend the constitutionality of the provision, and the district court ruled in favor of the plaintiff class. 460 F.Supp. 611, 612 (D.D.C. 1978). Since that time, amicus Jenkins has been attempting to devise an appropriate plan for implementation of the district court's orders and for the provision of retroactive benefits to members of the plaintiff class.

4. Defendant appealed the *Jenkins* decision and sought a stay. On June 7, 1979, the District of Columbia Court of Appeals stayed all further proceedings on the appeal until this Court's decision on this appeal.

5. With the consent of both parties, Barbara Jenkins filed a brief amicus curiae in *Clark* in May, 1979, urging affirmance of the decision below or dismissal of the appeal for want of a substantial federal question.

6. The decision in this appeal will directly affect amicus Jenkins' ability to complete her efforts to ensure that full benefits are made available to her son and to the children of other deceased federal employees who have been deprived of eligibility by the challenged provision.

7. Throughout the course of her efforts to resolve this issue, amicus has been represented by attorneys from the National Senior Citizens Law Center, who are experienced in issues involving government pension and benefit programs. They have appeared before this Court on numerous occasions as attorneys for amici, most recently representing the Gray Panthers in support of appellees' position in *Califano v. Yamasaki,* ___ U.S. ___, 47 U.S.L.W. 4765 (June 20, 1979).

WHEREFORE, Barbara Jenkins respectfully moves that the Court grant her leave to file the brief amicus curiae which accompanies this motion.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF BARBARA JENKINS

INTEREST OF AMICUS

A statement describing Barbara Jenkins' interest in this case is set forth in the preceding motion requesting leave to file this brief amicus curiae.

SUMMARY OF ARGUMENT

The jurisdiction of the Court of Claims to consider appellee's case is premised on the recognized power of that court to sever an unconstitutional provision from a statute, to read the statute without regard to the unconstitutional provision, and to make an award under the statute. The Court of Claims properly severed the lived-with provision from the Civil Service Retirement Act, as it represented only a subordinate aspect of that Act and its severance would not affect the operation of the statute. In light of this Court's presumption in favor of the extension of benefits when district courts enjoin the application of unconstitutional provisions which otherwise render a statute underinclusive, it is appropriate that the Court of Claims take similar action to ensure that benefits are paid to eligible recipients.

With the lived-with provision severed and read out of the statute, the Court of Claims could properly award benefits under the Civil Service Retirement Act. Any sovereign immunity which might exist is waived. The Court of Claims therefore had jurisdiction pursuant to 28 U.S.C. § 1491 to make the award to appellee. The award did not derive from the Constitution, but from the Act itself.

The lived-with provision conclusively bars illegitimate children who did not reside with the decedent from ever demonstrating dependency on the decedent and thus from ever obtaining benefits. Because it is a class of illegitimate children who are the subject of the discrimination, a more demanding level of scrutiny is applicable than would otherwise be applied to a legislative classification not based on illegitimacy. Assuming that one purpose of the Retirement Act is replacing support which is lost due to the death of the federal employee, the lived-with provision must fall to constitutional challenge because it does not substantially further that purpose. Indeed, several other federal courts, all of which have found the provision unconstitutional, have reasoned that it does not meet even the "rational basis" test.

The determination of unconstitutionality follows directly from this Court's decision in *Jimenez v. Weinberger*, 417 U.S. 628 (1974), in which a successful challenge was brought to a Social Security Act provision conclusively denying benefits to a class of illegitimate children who were not permitted to demonstrate dependency. Later decisions of this Court have not disturbed that decision, but have indicated only that a degree of "fine tuning" is required to permit intended beneficiaries to demonstrate their dependency. A previous panel of the Court of Claims and several district courts have carefully considered all but the most recent of this Court's applicable cases and have uniformly concluded that the lived-with provision is not sufficiently attuned to alternative considerations. The most recent Supreme Court cases do not alter this Court's previous evaluations and should not lead to a result different from those previously made.

Moreover, defendant's claim that the lived-with provision discourages fraudulent claims is similarly unconvincing. There is no evidence that the provision reduces the likelihood of spurious claims any more for resident than for non-resident children. The several other lower courts have concurred in this analysis, which follows directly from this Court's reasoning in *Jimenez*.

The conclusive denial of eligibility to a significant portion of those children whom survivor annuity benefits were intended to serve does not substantially further the purposes of the Act.

ARGUMENT

I.

THE COURT OF CLAIMS HAD JURISDICTION OVER THIS CASE

Defendant asserts that the Court of Claims lacked jurisdiction to consider the substantive issue. Specifically, the government argues that that court could not have invoked its ancillary relief powers to order the Commission to place Shawn and Tricia Clark on the annuity roles because it lacked the power to award a money judgment against the government and thereby had no ancillary power. (U.S. 17-18.) See *United States v. Testan*, 424 U.S. 392, 404 & n.7 (1976). The government contends that the Court of Claims was unable to award a money judgment for two reasons: first, because no provision of the Civil Service Retirement statute authorizes such a payment, and, secondly, because the doctrine of sovereign immunity forbids the award of money damages (U.S. 18-19).

Only the first of these contentions need, and should, be considered by this Court. If there is authorization for

the provision of a money award, then the Court of Claims was acting properly within its scope of authority in making the award and in exercising its ancillary powers. Sovereign immunity is not an issue, as the substantive right to a money award acts as a waiver of any immunity which might otherwise exist. *United States v. Testan, supra,* 424 U.S., at 400-401.

Conversely, if the Court of Claims was not empowered to order payment to plaintiffs, then, as the government argues, the court lacked jurisdiction over all plaintiffs' claims, including their request to be placed on the annuity roles. In that instance as well, there is no need to consider the impact of sovereign immunity, for the Court of Claims would be without jurisdiction.[1] Consequently, the only jurisdictional issue before this Court concerns the power of the Court of Claims to award benefits to individuals who have been, except for the existence of an unconstitutional provision, eligible from the first for those benefits.

---

[1]The government's argument on the second point is premature—if relevant at all. A decision by this Court that the Court of Claims was not empowered to award money damages to the plaintiffs would not, as the government recognizes (U.S. 23-24), affect the right of these plaintiffs, and others similarly situated, to seek a remedy in the district court via *Jenkins v. United States Civil Service Commission,* 460 F.Supp. 611 (D.D.C. 1978). The *Jenkins'* remedy includes retroactive benefits, but the government may contest the provision of those benefits on appeal. In *that* context, where the court's jurisdiction is incontestable, it might be appropriate, though not correct in the view of amicus, to contend that sovereign immunity precludes the award of retroactive benefits. But that issue is for another court in another case to decide. Sovereign immunity is not at issue in this case. Rather, only the jurisdiction of the Court of Claims is at issue, and the applicability of sovereign immunity is not relevant to that determination.

The initial consideration concerns the issue of severability. Although the government never explicitly discusses that point, its contention that no statutory authorization exists for the award of benefits to the plaintiffs necessarily includes the argument that the lived-with provision is not severable from the remainder of the statute. The question of severability was raised directly by defendant, however, in its challenge to the Court of Claims' jurisdiction in this case's identical predecessor, *Gentry v. United States,* 546 F.2d 343, 345 (1976), *reh'g denied,* 551 F.2d 852 (1977) (hereinafter, "*Gentry I*" and "*Gentry II,*" respectively). In *Gentry I,* defendant argued, as it does here, that as there was no provision specifically requiring the payment of benefits to plaintiffs, the Court of Claims lacked jurisdiction; there is "not a claim for money presently due and owing, as prescribed by a statute or the Constitution." 546 F.2d, at 345. Since the challenged provision did not require the payment of benefits to the plaintiffs (and, indeed, specifically precluded payment to them), it could not be read as the authorization for payment of money presently due and owing. *Ibid.* The Court of Claims rejected this contention and determined that its constitutional obligations required it to ignore the constitutional portions of the statute, "giv[ing] effect to all of a statute that it can without transgressing the oath of loyalty to the Constitution . . . " *Id.,* at 346.

That court, concerned whether severability was appropriate in that instance, directed its attention to whether the remainder of the statute could properly stand alone. It noted correctly: "If the live-with requirement is not separable from the other language of the statute, this court has no jurisdiction to grant recovery to plaintiff,

whether the requirement is constitutional or not." *Id.*, at 347.[2]

The Court of Claims' inquiry in *Gentry I* provides a complete analysis of the propriety of severability in this case. "That the live-with requirement is severable from the annuity statute is evident from an analysis of the statute's dominant purpose." *Id.*, at 347. That purpose, the court saw, is the provision of benefits to dependent survivors. "[T]he live-with requirement creates but a minor exception," and, in fact, was only added to the statute "after the purpose of aiding dependents was fixed in the law, apparently as a reaction to a judicial construction of the statute." *Ibid.*

> "This sequence of enactment demonstrates the clearly subordinate and, if constitutionally offensive, dispensable position of the live-with requirement. *United States v. Jackson*, . . . 390 U.S. [570] at 586-591 . . . [1968]. Further, and very importantly here, the thrust of the 1956 amendments did not vary significantly from the then-existing statutory focus on dependency, retaining the beneficiary status of those illegitimates whom, according to defendant, Congress thought most likely to be dependent, *i.e.*, those living with the annuitant in a regular parent-child relationship at the time of his death. We conclude from the legislative design and history, and the purpose as articulated by defendant, that the live-with requirement is subordinate in importance to, and independent of, the dominant

[2]The Court of Claims found it necessary, in order to determine whether it had jurisdiction, to consider the issue of severability before considering the provision's constitutionality. 546 F.2d, at 347. Defendant has effectively recognized the propriety of this reversal of the usual order by raising the issue of severability, though obliquely, before defending the statute's constitutionality. Amicus is in agreement with this ordering of the issues.

> congressional purpose embodied in the statutory scheme, and thus severable from the remaining provisions of the scheme." *Id.*, at 347-348 (footnote omitted).

With the challenged provision severed from the rest of the statute, because of its unconstitutionality, the *Gentry* court awarded benefits to plaintiffs on the basis of the Retirement Act as constitutionally interpreted. Thus, the Court of Claims *was* awarding benefits as prescribed by statute: the Retirement Act itself provided a "substantive right against the United States for money damages," *United States v. Testan, supra,* 424 U.S., at 398. The Court of Claims consequently had jurisdiction pursuant to 28 U.S.C. § 1491. See also *Chambers v. United States,* 451 F.2d 1045, 1050-1051 (Ct. Cl. 1971), and cases cited therein.

The Court of Claims' ability to read the unconstitutional provision out of the statute (where severable) is identical, in all relevant aspects, to an issue which regularly arises in courts with broader remedial powers. In a federal district court, when an offending provision is declared unconstitutional and its further application enjoined, a similar analysis has been validated by this Court, most recently in *Califano v. Westcott,* ___ U.S. ___, 47 U.S.L.W. 4817, 4821 (June 26, 1979). In that case, the Court quoted from Justice Harlan's concurring opinion in *Welsh v. United States,* 398 U.S. 333, 361 (1970), concerning the propriety of nullification or extension when a statute is found defective because of underinclusiveness—the very failure of the provision here under attack. This Court noted that the usual course favors extension, and cited numerous cases, involving the Social Security Act and other statutes, in which this Court had either extended benefits on its own or

summarily affirmed that action by district courts. 47 U.S.L.W., at 4821; see, especially, *Jimenez v. Weinberger*, 417 U.S. 628, 637-638 (1974); *Frontiero v. Richardson*, 411 U.S. 677, 691 & n.25 (1973) (plurality opinion). Implicit in these determinations is that the basis for the award—for the extension of benefits—is the statutory provision with its unconstitutional portion deleted as a result of the Court's conclusion, the same structural approach here employed by the Court of Claims.

In *Westcott*, this Court stated that "equitable considerations" supported the extension of benefits. Those same considerations support severability and extension in this instance; indeed, the two cases are closely parallel. The issue in *Westcott* was the constitutionality of the denial of AFDC-UF benefits to children in families in which the mother, not the father, was unemployed. This Court pointed out that nullification would result in the loss of these benefits to "approximately 300,000 needy children . . ., and an injunction suspending the program's operation would impose hardship on beneficiaries whom Congress plainly meant to protect." *Id.*, at 4821. Likewise, the probable Congressional intent in the Retirement Act was to assist dependent surviving children of deceased federal employees. See *infra*, at 23. To nullify the statute would have a disastrous effect on the overall provision of annuities to surviving dependent children. It would directly counter the intent of Congress.[3]

[3]As defendant points out (U.S. 21-22), there is no explicit severability provision in the Retirement Act comparable to that in the Social Security Act, 42 U.S.C. §1303, on which this Court placed partial support for extension. 47 U.S.L.W., at 4821 & n.8. The absence of such a provision, however, is not determinative of the propriety of severability; rather, the overall purpose of the survivor program and the live-with provision should be analyzed, as was done by the Court of Claims in *Gentry I*, to determine the propriety of severability.

In general, although this Court declined "to elaborate . . . the conditions under which invalidation rather than extension of an underinclusive federal benefits statute should be ordered," *id.*, at 4821, *Westcott* implies a presumption in favor of extension. Indeed, this Court stated that under the circumstances, it would only consider the issue "if the power to order extension were clearly beyond the constitutional competence of a federal district court," but given the "routine" affirmances of orders to that effect, "no such remedial incapacity exists." *Ibid.* Similarly, in the narrow context of this case, where a virtually identical issue, the propriety of the Court of Claims' decision to "read out" the offending provision, is under consideration, the same presumption should prevail. If, upon the enjoining of an unconstitutional provision, a district court can properly extend a benefit program to those previously excluded, it is equally appropriate that the Court of Claims, while incapable of issuing an injunction, should "extend" benefits to previously excluded beneficiaries by declining to consider the unconstitutional provisions. If the district court's decision in *Jenkins* were before this Court, rather than the *Clark* decision, the logic of *Westcott* and similar cases cited therein would undoubtedly result in an extension of benefits to this class. No legal or equitable reason exists for a different approach to the powers of the Court of Claims.[4]

[4]A situation identical to that in this case is created when a district court is asked to award benefits on the grounds that a provision is unconstitutional, but no request is made for declaratory or injunctive relief. In that instance, the district court is empowered to do exactly as the Court of Claims did in this instance: award benefits—and no more. In a seminal Social Security Act challenge, this Court recognized the propriety of that approach in

[footnote continued]

Indeed, the only argument which defendant makes to counter the analysis of the Court of Claims is that the *Gentry* court improperly relied on this Court's decision in *United States v. Lovett*, 328 U.S. 303 (1946), *aff'g* 66 F.Supp. 142 (Ct. Cl.) (U.S. 21, n.20), in support of severance. In *Lovett*, the Court of Claims considered a provision of an appropriations bill which specifically precluded payment for future services to four government employees whom Congress had determined were subversives. See 66 F.Supp., at 144. In the plurality opinion, the Court of Claims undertook the same initial inquiry as did that court in *Gentry:* whether the offending provision was severable from the remainder of the Act. *Id.*, at 144. Concluding that it was, the judges held that they were "in no doubt about our jurisdiction." *Ibid.* The concurring opinions indicated no concern about jurisdiction, and differed only in their conclusion that the challenged provision was unconstitutional. One judge, however, in language reminiscent of the *Gentry* court, indicated why a decision of unconstitutionality necessitated payment to plaintiffs:

> "And to whatever extent it is within the jurisdiction of a court to which the question is presented in litigation, to give judgment according to the Constitution, even though that requires the court

reviewing the district court's jurisdiction: "[The action] did not seek affirmatively to interdict the operation of a statutory scheme. A judgment for [plaintiff] would not put the operation of a federal statute under the restraint of an equity degree; indeed, apart from its effect under the doctrine of *stare decisis*, it would have no other result than to require the payment of [plaintiff's] benefits." *Flemming v. Nestor*, 363 U.S. 603, 607 (1960); see also *Myers v. Hampton*, No. 8682 (S.D. Ohio, Aug. 8, 1977) (district court did not enjoin application of "lived-with" provision, but declared it invalid and, explicitly following the analysis in *Gentry I*, read out the unconstitutional portion and awarded benefits).

> to disregard a statute which conflicts with the Constitution, the judges are bound by their oaths to give such a judgment. In this case, therefore, we must disregard [the challenged provision]." *Id.*, at 152 (Madden, J., concurring); see *Gentry I*, 546 F.2d, at 346.

On appeal, this Court did not even consider the jurisdictional issue. The only dispute was whether the offending section was unconstitutional. Through Justice Black, six members of the Court determined that it was a proscribed bill of attainder. They then affirmed the Court of Claims, holding that the offending section "does not stand as an obstacle to payment of compensation" to the plaintiffs. 328 U.S., at 318. In short, the Supreme Court accepted the Court of Claims' decision to read the offending provision out of the act.[5]

For purposes of this case, *Lovett* stands for the proposition that the Court of Claims has jurisdiction to consider money claims in situations where a provision of a statute explicitly forbids payment to the claimants if that provision is found unconstitutional and is properly severed. The entire five-member Court of Claims accepted the propriety of severability and the court's jurisdiction to render a money judgment. The Supreme Court accepted without discussion the Court of Claims' decision to sever and to take jurisdiction of the case, with the necessary result that a provision which explicitly forbade payment to the claimants was ignored so that the claim was compensable under the remaining portions of the statute. That is precisely the analysis of the Court of Claims in *Gentry*, and, necessarily, in the instant case.

[5]The two concurring Justices disagreed only in the majority's determination that the provision was unconstitutional. 328 U.S., at 330 (Frankfurter, Reed, JJ., concurring).

Defendant has not suggested that the *Lovett* holding should be overruled, but, rather, that *Lovett* is distinguishable on the grounds that the offending provision "was relevant only as a bar to payments to which the petitioners otherwise would have been entitled. Here, in contrast, [plaintiffs] have no claim against the government that is not based on the challenged statute." (U.S. 21, n.20.) This analysis, however, begs the question of severability. Illegitimate children, like their legitimate counterparts, *are* entitled to payments; but for the bar of the lived-with provision, they would receive payments. In fact, after the decision in *Visor v. United States,* Civ. No. 9922(2) (E.D. Mo., Feb. 12, 1955), and prior to the implementation of the lived-with provision in 1956 (see U.S. 28), other illegitimate children in the same situation did receive payments under the statute. In this respect they are no different from the *Lovett* plaintiffs, who had previously been reimbursed, but who were denied further payments solely because of the operation of an unconstitutional provision. In each instance, the deletion of the offending provision returns the statute to its previous propriety.

It is no argument that the *Lovett* claimants' entitlement was based on separate considerations, such as that they had worked for their pay. The parents of the illegitimate children affected by the lived-with provision also worked for that entitlement; retirement benefits, including survivor annuity benefits, are an incident to that work and the entitlement is no different. The entitlement to benefits existed at all times in both circumstances; only the insertion of a specific bar prevented payments. The removal of that bar, upon a determination of its unconstitutionality, requires payment to otherwise eligible individuals in each instance. Separating out

the offending provision, as the Court of Claims did in each instance, results in payment under still-existing provisions.

Section 1491 gives the Court of Claims jurisdiction over claims "founded . . . upon the Constitution . . . ." Defendant also argues that as this is a constitutional claim, there is no basis "for an award of money damages as a remedy for any unconstitutionality there may be in the statute." (U.S. 18.) Thus, defendant appears to be contending that plaintiffs are improperly looking to the Constitution as the basis for the payment of accrued benefits.

This contention again misses the mark. Amicus does not suggest that the Constitution serves as the triggering mechanism for the provision of benefits, but, only that the claim is a constitutional one and thereby properly before the Court of Claims pursuant to section 1491—which specifically permits such claims. The Act itself provides for the payment of benefits.

This Court has interpreted a narrower jurisdictional provision in a similar fashion. In *Weinberger v. Salfi,* 422 U.S. 749 (1975), the Court was faced at the outset with the propriety of district court jurisdiction over a constitutional challenge to a Social Security Act provision which excluded certain otherwise eligible individuals from coverage. The district court had found jurisdiction under the general federal-question provision, 28 U.S.C. § 1331, despite a specific prohibition forbidding jurisdiction under that section: "No action against the United States, the Secretary, or any officer or employee therefore shall be brought under [§ 1331] of Title 28 to recover on any claim arising under [Title II of the Social Security Act]." 42 U.S.C. § 405(h). Plaintiffs argued to this Court that the prohibition in section 405(h) was

inapplicable because it refers only to actions brought under Title II, not under the Constitution. This Court held to the contrary:

> "[I]t is . . . fruitless to argue that this action does not also arise under the Social Security Act. For not only is it Social Security benefits which [plaintiffs] seek to recover, but it is the Social Security Act which provides both the standing and the substantive basis for the presentation of their constitutional contentions. [Plaintiffs] sought . . . a judgment directing the Secretary to pay Social Security benefits. To contend that such an action does not arise under the Act whose benefits are sought is to ignore both the language and the substance of the complaint and the judgment." *Weinberger v. Salfi, supra,* 422 U.S., at 760-761.

Thus, this Court determined that a challenge to the constitutionality of the Social Security Act was, in fact, an "action" to "recover on [a Social Security] claim." *Id.*, at 762. Similarly, section 1491 permits plaintiffs to recover money damages on a challenge to the constitutionality of the Civil Service Retirement Act. The action arises under both the Constitution and the statute, but it is incorrect to contend that plaintiffs are looking to the Constitution as the source for their recovery of benefits. For not only is it Civil Service Retirement benefits which plaintiffs seek to recover, but it is also the Civil Service Retirement Act which provides both the standing and the substantive basis for the presentation of their constitutional contentions.

Consequently, the fact that benefits are sought pursuant to a constitutional challenge, rather than on a theory of administrative misinterpretation of the statute, is irrelevant for the purpose of determining the court's jurisdiction. The Court of Claims has jurisdiction to

consider whether payments should be made under the Act, and those payments are appropriately made when the challenged provision is deleted from the statute. In that situation, just as would have been the case in *Salfi* had plaintiffs prevailed, the claimants are receiving benefits under the Act.

This case was thus properly before the Court of Claims pursuant to 28 U.S.C. § 1491. Plaintiffs made a constitutional challenge, seeking benefits due them under the Civil Service Retirement Act. That Act provides for the payment of benefits to surviving children of deceased federal employees. Plaintiffs had not previously received those benefits because of the lived-with provision. That subsection is of minor importance to the overall purpose of providing benefits to surviving children; consequently, the Court of Claims properly severed it, as this Court has done and countenanced in similar circumstances. Once the lived-with provision was read out of the statute, the Court of Claims could properly award benefits under the Act. That court was enforcing a substantive right against the United States for money damages.

II.

THE "LIVE-WITH" PROVISION IMPERMISSIBLY DISCRIMINATES AGAINST ILLEGITIMATE CHILDREN.

A. A "substantial relation" test is applied to classifications based on legitimacy.

Amicus is in partial agreement with defendant's evaluation of the level of scrutiny applicable to classifications involving illegitimacy. (U.S. 25-27.) It should be emphasized, however, that the appropriate standard is more demanding than the "rational basis" test.

That the appropriate analysis in this action requires a middle level of scrutiny is abundantly evident from cases decided during the last term. Reviewing *Trimble v. Gordon,* 430 U.S. 762 (1977), this Court summarized the standard applicable to classifications based on illegitimacy: "Although . . . classifications based on illegitimacy are not subject to 'strict scrutiny,' they nevertheless are invalid under the Fourteenth Amendment if they are not substantially related to permissible state interests." *Lalli v. Lalli,* 99 S.Ct. 518, 523 (1978) (plurality opinion).

Echoing this intermediate standard of review have been the two most recent decisions in which discrimination based on illegitimacy was discussed. In *Parham v. Hughes,* 99 S.Ct. 1742, 1745 (1979) (plurality opinion), the Court noted that the presumption in favor of the constitutionality of a statute may be "undermined when a State has enacted legislation creating classes based upon certain other immutable attributes." Citing several cases in which "immutable attributes" had been the subject of classifications, the Court made reference to illegitimacy and gender, among others. The implication was that the standard applicable to classifications premised on illegitimacy is comparable to that for classifications based on sex. At a minimum, those classifications require something more than the least demanding scrutiny. See, *e.g., Califano v. Goldfarb,* 430 U.S. 199 (1977); *Craig v. Boren,* 429 U.S. 190, 197 (1977); *Parham v. Hughes, supra,* 99 S.Ct., at 1750 (Powell, J., concurring).

Finally, the issue was evaluated by both the majority and the dissent in *Califano v. Boles,* ___ U.S. ___, 47 U.S.L.W. 4874 (June 26, 1979). In his opinion for the majority, Justice Rehnquist carefully explained that the case did not involve discrimination against illegitimate children with the necessary result that the government

needed to show only a "rational relation" between the statute's goals and its operation. *Id.,* at 4876-4878. Implicit in the majority's reasoning is that a determination that illegitimacy was the premise for the classification would have warranted a more demanding scrutiny, as the district court had concluded. *Id.,* at 4876. Four members of the Court in dissent were explicit on this point: "If . . . the statute benefits children [as opposed to mothers], then it incorporates a distinction based on legitimacy which must be tested under the more rigorous standard of *Jimenez v. Weinberger,* 417 U.S. 628 (1974), and *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164 (1972)." *Id.,* at 4878.

Amicus does not intend to belabor a point which has received extensive briefing before, and consideration by, this Court. Her intention is only to rebut the government's emphasis that less than the strictest scrutiny should be applied. Equally true is the important converse: more than the least demanding scrutiny must also be applied. The appropriate level of analysis requires, at a minimum, that the statute bear a *substantial* relation to the permissible governmental interests it is designed to serve. *Lalli v. Lalli, supra,* 99 S.Ct., at 524. Defendant cannot make that showing.[6]

B. The conclusive denial of benefits to non-resident illegitimate children is not substantially related to the Act's purposes.

The constitutionality of the lived-with provision has now been considered on numerous occasions and defendant's arguments have been unanimously rejected in each

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[6]Indeed, it is unlikely that the lived-with provision can pass even the least demanding scrutiny under the rational relation test. See *Proctor v. United States,* 448 F.Supp. 418, 426 (D.D.C. 1977) (3-judge district court).

instance.[7] Defendant offers no new arguments in its most recent brief on the issue and does not assert some of its earlier contentions.[8] It rests finally on the same basic two arguments which have been offered in all of the previous cases, with the only new element being this Court's decision in *Lalli v. Lalli, supra*, which was not available for consideration by the lower courts. Nothing in *Lalli*, however, nor in any of defendant's previous arguments, supports the constitutionality of the lived-with requirement. Decisions of this Court, especially when read in conjunction with the several lower court decisions invalidating the provision, indicate that the Court of Claims' decision below was correct.

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[7]The decision by the Court of Claims below means that a total of eleven federal judges, sitting on four courts, have considered the substantive issue eight times and have agreed with plaintiffs on every occasion. *Myers v. Hampton*, No. 8682 (S.D. Ohio, Sept. 18, 1973), *rem'd* 427 U.S. 909 (1976) ("*Myers I*"); *Gentry v. United States*, 546 F.2d 343 (Ct. Cl. 1976), *reh'g denied* 551 F.2d 852 (Ct. Cl. 1977); *Myers v. Hampton*, No. 8682 (S.D. Ohio, Aug. 8, 1977) ("*Myers II*"); *Tenny v. United States*, 441 F.Supp. 224 (E.D. Mo. 1977); *Proctor v. United States*, 448 F.Supp. 418 (D.D.C. 1977) (3-judge district court); *Jenkins v. United States Civil Service Commission*, 460 F.Supp. 611 (D.D.C. 1978). Judge Bennett of the Court of Claims sat on both the *Gentry* and *Clark* cases. Judge Skelton of the Court of Claims, while joining in the *Gentry* result, initially did not find the statute unconstitutional, 546 F.2d, at 356-357; by not filing a separate opinion on defendant's rehearing request, however, he appears to have agreed with the majority's determination of unconstitutionality. It is worth noting as well that four justices of this Court voted to affirm the original *Myers* decision even after the decision in *Mathews v. Lucas*, 427 U.S. 495 (1976). See 427 U.S. 909.

[8]Defendants previously argued that this Court's decision in *Mathews v. de Castro*, 429 U.S. 181 (1976), provided support for their arguments. But after that argument was repeatedly rejected, see *Gentry II, supra*, 551 F.2d, at 853-855; *Myers II, supra*, Sl. Op., at 7-8; *Tenny, supra*, 441 F.Supp., at 228; *Proctor, supra*, 448 F.Supp., at 423-424, defendant has apparently decided no longer to press that contention.

Defendant argues initially that the purpose of the Civil Service Retirement Act in general, and the provision of benefits to children in particular, was "to replace support lost by the wage-earner's dependents when he dies." (U.S. 27; footnote omitted.) Although amicus believes that that issue is not so easily resolved as defendant claims (and that, as the Court of Claims contends, the purpose may well have been to provide benefits to all survivors regardless of dependency, see *Gentry I, supra*, 546 F.2d, at 353; *Gentry II, supra*, 551 F.2d, at 854-855), it will here be assumed, without admitting, that the purpose of the Act is as the government contends. See *Proctor, supra*, 448 F.Supp., at 421 & n.1.[9] In the remainder of this brief, therefore, amicus will demonstrate why the conclusive denial of survivor's benefits to illegitimate children who did not live with the federal employee prior to his death does not substantially further the alleged purpose of providing benefits to dependents of federal employees.

The "lived-with" provision results in an extension of benefits to all surviving children of a federal employee "save for those of his illegitimate issue who did not reside in his home." *Gentry I, supra*, 546 F.2d, at 348. These children are conclusively forbidden from ever demonstrating dependency on the decedent. Thus, two different classifications are created. First, children are classified at their parent's death according to their legitimacy; all legitimate children, regardless of whether

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[9]A determination that the purpose of the residency requirement was to provide benefits without regard to dependency would not lead to a different result, and would involve only a slightly different analysis. See *Gentry I, supra*, 546 F.2d, at 353-354; *Gentry II, supra*, 551 F.2d, at 854-855; *Proctor, supra*, 448 F.Supp., at 421 n.1.

they were living with the decedent and/or were dependent upon him for their support, are automatically eligible for benefits without any further showing. *Id.*, at 348. Second, illegitimate children are classified at their parent's death on the basis of whether or not they lived with the parent. If they did, they automatically are eligible for survivor annuity benefits; if they did not, they are forever barred from obtaining benefits, regardless of whatever showing of dependency they might be able to make. *Id.*, at 348-349. Viewed alternatively, the classification is made on the basis of legitimacy or illegitimacy of those children who did not live with the decedent. The legitimate children are automatically eligible, and the illegitimate children are automatically ineligible, both without any further showing. *Tenny, supra,* 441 F.Supp., at 226. However the classificatory structure is framed, though, the simple fact remains that certain illegitimate children are conclusively denied benefits which are available to legitimate children and that the excluded children are given no opportunity under the statute to demonstrate their dependency and entitlement to benefits. The fact that a subset of illegitimate children is also eligible does not avoid the basic nature of the discrimination, which is one premised on legitimacy. The cases all accept that conclusion, and, indeed, defendant does not argue that the issue here is other than a classification based on illegitimacy. Compare *Califano v. Boles,* ___ U.S. ___, 47 U.S.L.W. 4874, 4877-4878 (June 26, 1979).

Defendant's main argument in support of this classificatory scheme is that it furthers the legislative purpose "by providing a ready method of identifying those illegitimate children most likely to have lost support." (U.S. 27.) Under this rationale, the fact of having lived

with the federal employee is viewed as probable evidence that the child was dependent on him, and it is therefore appropriate that the lost support be replaced. Conversely, this approach assumes both that illegitimate children not living with the decedent were not supported by him and that legitimate children in the same position were.

Presented with this argument, the lower courts have repeatedly pointed to the Supreme Court case most directly on point, *Jimenez v. Weinberger,* 417 U.S. 618 (1974). That case involved a Social Security Act provision authorizing benefits for the children of disabled workers. As in this case, "[t]he government maintained and the Court agreed that the overall purpose of the statutory scheme was to channel financial support to children actually dependent on the disabled workers . . . ." *Proctor, supra,* 448 F.Supp., at 420-421. All legitimate children automatically were eligible for benefits, and illegitimate children born before their parent's disability began were eligible if they could demonstrate dependency through any of several showings, including either having lived with, or having received support from, the decedent. In contrast, illegitimates born after the onset of the disability, unless they fit into certain statutory exceptions, were precluded from demonstrating dependency. Like the illegitimate children in this case, they were conclusively barred from eligibility.

Defendant offered virtually the same rationale for that scheme as is offered in this case: "The Secretary maintains that the Act denies benefits to [certain] afterborn illegitimates . . . because it is 'likely' that these illegitimates, as a class, will not possess the requisite economic dependency on the wage earner which would entitle them to recover under the Act . . . ." *Jimenez v. Weinberger, supra,* 417 U.S., at 634. This Court was unconvinced by

that argument. The statute was considered overinclusive since it provided benefits for some illegitimate children who were not dependent. "Conversely, the Act is 'underinclusive' in that it conclusively excludes some illegitimates . . . who are, in fact, dependent upon their disabled parent . . . . [T]o conclusively deny one subclass benefits presumptively available to the other denies the former the equal protection of the laws . . . ." *Id.*, at 637.

Recognizing the similarity to *Jimenez*, see, *e.g.*, *Gentry I*, 546 F.2d, at 351; *Proctor, supra*, 448 F.Supp., at 421, the courts which have considered the issue of this case have relied significantly on that decision. Thus, they have repeatedly held that the challenged classificatory scheme was invalid under this Court's reasoning in *Jimenez:*

> "No good reason appears, in light of the purpose of financially assisting those most probably dependent, for differentiating between potentially dependent but nonresident illegitimates, on the one hand, and resident illegitimates along with resident and nonresident legitimates, on the other. The classification of illegitimates, as embodied in the live-with requirement, is not justified by the basic legislative purpose." *Gentry I, supra*, 546 F.2d, at 351; see also *Myers II, supra*, Sl. Op., at 5-6; *Tenny, supra*, 441 F.Supp., at 227; *Proctor, supra*, 448 F.Supp., at 424-425.

Defendant has consistently challenged these arguments, however, contending that *Mathews v. Lucas*, 427 U.S. 495 (1976), not *Jimenez*, should control the outcome of this issue. The statutory scheme in *Lucas* presumed financial dependency for all legitimate and some illegitimate children, while other illegitimate children were required to prove dependency. 427 U.S., at 497-499.

Defendant argues that this case meets the requirements set out in *Lucas* by which "'the likelihood of actual support [is] suggested by a narrow set of objective and apparently reasonable indicators,' even though the indicators may not be precisely accurate." (U.S. 31-32, quoting in part from *id.*, at 516.) But, as before, defendant ignores the salient characteristic of *Lucas*, which distinguishes it from *Jimenez:* the conclusive denial of benefits in the latter case "is absent here, for . . . an otherwise eligible child may qualify for survivorship benefits by showing contribution to support or cohabitation, at the time of death." 427 U.S., at 512 (citations omitted). The statute here challenged, like that in *Jimenez*, is conclusive in its denial of benefits, regardless of the child's ability to demonstrate support by the decedent.

The lower courts have recognized the distinction between *Lucas* and *Jimenez*. See *Gentry I, supra*, 546 F.2d, at 352; *Myers II, supra*, Sl. Op., at 5-6; *Proctor, supra*, 448 F.Supp., at 422; *Tenny, supra*, 441 F.Supp., at 228. In *Proctor* the three-judge court carefully detailed the additional guidance provided by *Lucas:*

> "*Lucas* represents a useful refinement of the *Jimenez* opinion . . . . *Lucas* established that the decisive constitutional requirement in such cases is a fair opportunity for plaintiffs to demonstrate, *before being rejected conclusively for benefits*, that they are in the class of people the statute is designed to serve." 448 F.Supp., at 423 (emphasis supplied).

The court further noted that "*Lucas* and *Jimenez* indicate that when a government program aiding dependents of workers is involved, illegitimate children must be given an opportunity to show dependency." *Id.*, at 424. Noting that this Court elaborated on the *Lucas* concept of

"fine tuning" in *Trimble v. Gordon, supra,* 430 U.S., at 772, the court concluded that the existence of only one criterion by which to measure dependency was insufficient to meet constitutional requirements. "[C]ohabitation with one's parent does not correlate reliably with economic dependency upon one's parent." *Proctor, supra,* 448 F.Supp., at 425. Other factors, such as those available to evaluate dependency in the *Lucas* situation, must be considered as well; had they been, these children would have been found dependent. *Ibid.* In short, the challenged provision "discriminates between legitimates and illegitimates without the fine tuning such a sensitive distinction requires." *Id.*, at 426.

This Court should view the situation similarly. The illegitimate children are forever barred from proving dependency, like those in *Jimenez* and unlike those in *Lucas,* regardless of its existence in fact. This is not merely the unfortunate, but necessary result of the drawing of categorical lines, as defendant argues. (U.S. 31.) This is, instead, the deprivation of large numbers of dependent children by a statute, the purpose of which, as defendant contends, is to assist dependent children. A considerable segment of the population for whom the benefits were designed has thus been deprived of eligibility because of the operation of a provision which lacks the requisite sensitivity.[10] Differential treatment

[10]Although defendant claimed that it could not provide figures as to the number of otherwise eligible illegitimates denied benefits because of the operation of the lived-with provision as requested by amicus in discovery in *Jenkins,* the parties did compile some estimates. It was stipulated that the number of illegitimate children denied benefits because of the operation of the lived-with provision from fiscal 1972 through fiscal 1977 was between 10,347 and 22,241. The court accepted this stipulated estimate in an order dated August 22, 1978. In the Commission's Financial and

[footnote continued]

of legitimate and illegitimate children is not per se forbidden, but when some of the latter are permanently barred from demonstrating that they are among those whom the statute was intended to benefit, that discrimination rises to the level of unconstitutionality. It simply cannot be said that a statute which deprives a significant segment of intended beneficiaries from demonstrating eligibility bears a substantial relation to the purpose of the Act.

Defendant's only argument not placed before other courts is that the *Lalli* decision supports the single criterion approach.[11] (U.S. 33-34.) But the plurality's *Lalli* opinion does no more than provide the obverse of *Trimble;* no new point of law was announced. Instead, the Court merely upheld the use of an "evidentiary" requirement that paternity be established prior to death if the child is to inherit from his father. The key difference between *Lalli* and the instant situation is that

Statistical Data for Fiscal Year 1977, the Commission listed a total of 68,937 children added as survivor annuitants for the six-year period of 1972-1977. Table B-6. It should be evident, therefore, that the lived-with provision has conclusively deprived a huge class of otherwise-eligible beneficiaries, its size ranging from 15.0% of the existing child recipients to 32.3%. The lived-with provision, thus, cannot be viewed as a mere classificatory measure with certain unfortunate results for a uniquely situated few. Rather, it affects a significant portion of those whom the Act is intended to serve.

[11]*Trimble v. Gordon, supra,* 430 U.S., at 770-771, in which this Court first noted that a statute might employ "a middle ground between the extremes of complete exclusion and case-by-case determination," and from which the decision in *Lalli* flows, see 99 S.Ct., at 524, was considered in *Proctor,* and, implicitly, by the Court of Claims in the decision below. The *Proctor* court concluded that *Trimble* did not alter the outcome, as it only reiterated the importance of "alternative considerations." 448 F.Supp., at 425.

the provision in the former does not act in a wholesale fashion to disenfranchise the very people who should be eligible. The *Trimble* statute was invalidated for that reason, 99 S.Ct., at 527, but the statute in *Lalli* does not "inevitably disqualif[y] an unnecessarily large number of children born out of wedlock." *Ibid.* This Court noted that its focus must be on whether the challenged "statute's relation to the state interests it is intended to promote is so tenuous that it lacks the rationality contemplated by the Fourteenth Amendment." *Ibid.* In *Lalli,* the evidentiary requirement did not have that effect. But in *Trimble* and the instant case, where children are forbidden from demonstrating the very factor (dependency) which motivates the operation of the statute, that rationality is lacking.

Lalli only further explores the concepts previously announced in *Trimble* and *Lucas.* The basic premise of those cases, that fine tuning is required, has not been altered. The lived-with provision lacks that necessary element.

Defendant also argues that the lived-with provision allows a more efficient administration of the Act and discourages fraudulent claims. The same claim was made in *Jimenez.* See 417 U.S., at 634. The contention there was that "evidence of parentage or support may be fabricated," *id.,* at 636, while in the instant case, the government argues that evidence that a child has been recognized may either be "ambiguous" or "fabricated." (U.S. 35.) The lived-with requirement, defendant argues, provides easier identification of eligible beneficiaries. But this Court rejected that approach in *Jimenez, supra,* 417 U.S., at 636:

> "It does not follow, however, that the blanket and conclusive exclusion of [plaintiffs'] subclass of illegitimates is reasonably related to the prevention of spurious claims . . . . [I]t would discriminate between the two subclasses of afterborn illegitimates without any basis for the distinction since the potential for spurious claims is exactly the same as to both subclasses."

That the same problem exists in the instant situation was first recognized in *Gentry I.* The court held that the potential for spurious claims was the same for both residents and nonresidents, just as in *Jimenez.* 546 F.2d, at 351-352. Quoting from plaintiff's brief in *Gentry,* the Court of Claims notes that children might well be living with a man not their natural father, and that the mother might make a claim, at his death, that they were his children. *Id.,* at 351-352. While it may well be true, as defendant asserts, that "[e]vidence that the child was living with the wage-earner at his death is less likely to be ambiguous and is harder to fabricate," (U.S. 35), that is no answer to the question whether a resident will be more unlikely to file a spurious claim than a non-resident. The Court of Claims concluded that the lived-with provision simply did not accomplish its purported goal. *Accord, Tenny, supra,* 441 F.Supp., at 227; *Proctor, supra,* 448 F.Supp., at 425.

In short, the contention that the provision avoids spurious claims is simply incorrect. Residents and nonresidents are in the same position to make false claims: "The legislative goal of preventing spurious claims of parentage is no more promoted by the live-with requirement than it was by the banning of after-born illegitimates in *Jimenez.*" *Gentry I, supra,* 546 F.2d, at 351. While it may be true that the evidentiary problems for nonresidents is greater, "it does not follow . . . 'that the blanket and conclusive exclusion of [plaintiff's]

subclass of illegitimates is reasonably related to the prevention of spurious claims.'" *Id.*, at 351, quoting in part from *Jimenez, supra,* 417 U.S., at 636. What gains in efficiency are affected by the conclusive exclusion of nonresident illegitimate children are more than offset by the wholesale denial of eligibility to those individuals for whom the benefits were designed. Simplification of evidentiary problems alone cannot serve as "an impenetrable barrier that works to shield otherwise invidious discrimination." *Gomez v. Perez,* 409 U.S. 535, 538 (1973). Thus, the government argues that *Lalli* supports classifications which encourage efficiency (U.S. 35), but ignores that the provision at issue there adversely affected only a small number of those otherwise eligible, 99 S.Ct., at 527, which is the standard and acceptable result of classificatory schemes. In the instant case, however, an entire class of individuals for whom the benefits were intended are forever excluded from demonstrating eligibility. Efficient administration of the program cannot provide a sufficient rationale for disenfranchisement of the Act's intended beneficiaries.

The lived-with provision must fail because it does not substantially further its purpose, which is, by the government's own contention, to replace support lost due to the death of the federal employee. It not only results in the payment of benefits to nondependents, but also specifically and finally denies benefits to a significant subclass of dependent illegitimate children. Even if the former inadequacy can be ignored, the latter is sufficient to seal the statute's fate. The three-judge court in *Proctor* summarized this ultimate failing in this manner:

> "The matter boils down to this: given that the overall purpose of the statute is to aid dependents of federal employees, and given that the 'character

> of the discrimination' here revolves around use of a single criterion to determine the dependency of illegitimates, and given that the relationship between the discriminatory factor and the statutory purpose must survive an analysis of intermediate intensity, does imposition of this single criterion upon illegitimates deprive them of the equal protection of the laws? This Court decides that it does. In this day and age, cohabitation with one's parent does not correlate reliably with economic dependency upon one's parent, as any consideration of the number of divorces and separations involving the once-married will show." 448 F.Supp., at 425.

The lower courts, ranging from single judges to three-judge panels of the Court of Claims and of a district court, have consistently and adamantly rejected the arguments offered here by defendant.[12] This Court has itself recognized the impropriety of the conclusive exclusion of illegitimates who were in fact dependent in *Jimenez,* and has emphasized the need for a degree of "fine tuning" as explained in *Lucas, Trimble,* and *Lalli.* In light of these decisions, a provision which utilizes only one criterion for demonstrating dependency by illegitimate children and otherwise conclusively precludes such a demonstration cannot bear a substantial relationship to the purposes of the Retirement Act. Indeed, it is so tenuous that not even a rational basis for the provision exists. "Much less could the relationship in question withstand a more demanding level of scrutiny." *Proctor, supra,* 448 F.Supp., at 426.

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[12] Indeed, the first judge to consider the issue found so little merit in the government's contention that he refused to convene a three-judge district court, deciding instead to "accept the invitation extended to a single district judge in *Bailey v. Patterson,* 369 U.S. 31 (1962) . . . to declare a statute unconstitutional where any defense would be clearly frivolous." *Myers I,* Sl. Op., at 2.

CONCLUSION

For all of the reasons outlined above, amicus urges the affirmance of the decision of the Court of Claims.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1513

UNITED STATES OF AMERICA, *Appellant*

v.

PATRICIA ILENE CLARK, GUARDIAN FOR SHAWN D. CLARK AND TRICIA D. CLARK, MINOR CHILDREN, *Appellee*

On Appeal from the United States Court of Claims

APPELLEE'S OBJECTIONS TO MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

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APPELLEE'S OBJECTIONS TO MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to the provisions of Rule 42(3) of the Supreme Court Rules, appellee hereby objects to the motion for leave to file an amicus curiae brief submitted in this case by the National Senior Citizens Law Center on behalf of Barbara Jenkins, and states:

1. As a matter of general practice,

Rule 42(1) provides that motions for leave to file amicus curiae briefs are not favored, and Rule 42(2) states that, in cases before the Court on the merits, a brief of an amicus curiae may be filed only after order of the Court. In this case, no such order has been issued; there has been no written consent of the parties; but nevertheless the National Senior Citizens Law Center has lodged an amicus curiae brief with the Court in this case which duplicates in substance the arguments and citations already presented fully by appellee's brief.

Thus, the proposed amicus curiae brief presents nothing new for the Court's consideration, and its acceptance would merely unnecessarily add to the Court's burden in this case.

2. Moreover, while Barbara Jenkins and the class of minor civil service annuitants she purports to represent in

Jenkins v. United States Civil Service Commission, 460 F.Supp. 611 (D.C.,D.C. 1978), appeal pending U.S. Court of Appeals for the District of Columbia Circuit, may have perfectly good annuity claims under the Civil Service Retirement Act to pursue in that case, there is clearly no need for her to become involved in this case which is limited exclusively to the very narrow, extremely favorable facts that support the specific annuity claims of Shawn and Tricia Clark standing alone. Neither Shawn and Tricia nor their mother purport to "represent a class of claimants," and they are not prepared to concede, directly or indirectly, that Shawn's and Tricia's claims under the statute are the same as those asserted by Barbara Jenkins on behalf of the broad class of claimants she is endeavoring to represent.

Here, the record establishes that

Shawn and Tricia lived with their deceased father under the same roof through 1971; that, in 1972, during the father's lifetime, a court of competent jurisdiction entered a decree which judicially established the parent-child relationship between Shawn, Tricia and their father; the father was ordered to support Shawn and Tricia, and he did support them to the date of his death -- and even after his death, through proceeds of life insurance.

Appellee asserts that these facts patently entitle Shawn and Tricia to the relief granted by the Court of Claims in this case. If that assertion is correct, it would clearly be unjust and unfair for their case to be complicated or encumbered by broad "class action claims," wherein the actual factual situations may be far different, in some instances at least, than the clear-cut situation presently

before the Court in this case standing alone.

3. Furthermore, Barbara Jenkins and the "class" she and the National Senior Citizens Law Center represent, are not mere "friends of the Court" in the usual context. Rather, they are active litigants in another case which is presently pending before the United States Court of Appeals for the District of Columbia Circuit, and which might ultimately reach this Court via a petition for certiorari. In effect, therefore, instead of presenting the ordinary type of amicus curiae brief for this Court's consideration, these litigants from another forum are endeavoring to argue their case here in advance of any hearing in the Court of Appeals.

4. Finally, the proposed amicus curiae brief endeavors to re-argue, as appellee has already done in her brief,

that "The Court of Claims Had Jurisdiction Over This Case" and "The Lived-With Provision Impermissibly Discriminates Against Illegitimate Children." But, Jenkins and her class did not bring their claims in the Court of Claims – they sued in the District Court; and in that District Court case, the Government elected not to "defend the constitutionality [of the 'lived-with' provision]" (see Jenkins v. U. S. Civil Service Commission, at 460 F.Supp. 611, 612.

Thus, Jenkins and the class she represents have no compelling interest in the Court of Claims jurisdictional issue or the Fifth Amendment issues involved in this case.

In the final analysis, their presence here is unnecessary, and it tends to complicate (through broad, sweeping "class action-type" considerations) this very simple case which relates to Shawn and

Tricia Clark alone and their legal right to a survivors' annuity under the Civil Service Retirement Act based exclusively on the specific facts of this case. In other words, the appearance of Barbara Jenkins and her class might well unfairly prejudice the rights of the two (2) minors in this case as first brought before this Court.

CONCLUSION

While appellee and her connsel wish Barbara Jenkins and the National Senior Citizens Law Center continuing good luck in the endeavors they are making in a completely separate class action case in the District of Columbia Circuit they strenuously oppose their amicus curiae appearance in this case, and therefore, urge this Court to deny their motion for leave to file the amicus

curiae brief lodged herein on August 2, 1979.

Respectfully submitted,

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that copies of appellee's foregoing objections to the motion for leave to file amicus curiae brief were served by mail this 8th day of August, 1979 upon Ms. Toby S. Edelman, National Senior Citizens Law Center, 1424 16th Street, N. W., Washington, D.C., 20036, attorney for amicus curiae, and Honorable Harriet S. Shapiro, Assistant to The Solicitor General, Department of Justice, Washington, D. C. 20530.

Edward L. Merrigan